Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly held, in conflict with every other circuit that has decided the question, that a plaintiff who has knowingly allowed the statute of limitations to lapse on alleged violations of federal anti-discrimination statutes may nevertheless sue on such time-barred claims whenever incidents within the limitations period are "sufficiently related" to the otherwise time-barred claims.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit:

1. National Railroad Passenger Corporation, a federally chartered corporation, dba Amtrak, defendant-appellee; and

2. Abner Morgan, Jr., plaintiff-appellant.

Petitioner National Railroad Passenger Corporation is federally chartered and is not a publicly traded corporation. The United States of America owns 100% of the preferred shares under the name of the Secretary of Transportation. The following companies each own 10% or more of the corporation's common stock: Burlington Northern/Santa Fe Railroad Company and American Premier Underwriters (successor to the Penn Central Railroad).

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PETITION FOR WRIT OF CERTIORARI

National Railroad Passenger Corporation, dba Amtrak, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 232 F.3d 1008. The order of the court denying rehearing and rehearing en banc (App., *infra*, 23a) is unreported. The district court's opinion granting partial summary judgment to petitioner (App., *infra*, 24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2000. App., *infra*, 1a. A petition for rehearing and rehearing en banc was denied on January 22, 2001. App., *infra*, 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1) (1982), provides:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred * * *, except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * *, such charge shall be filed [with the EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred * * *.

STATEMENT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race. 42 U.S.C. § 2000e-2 *et. seq.* Prohibited discrimination includes racial harassment and retaliation. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); 42 U.S.C. § 2000e-3.

Title VII requires employees who believe that they have been subjected to unlawful discrimination to file a claim with an administrative agency prior to proceeding to court. 42 U.S.C. § 2000e-5(e)(1). A claim is time-barred unless the employee files a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the incident, or within 300 days of the incident if the employee first files the charge with a state or local agency. *Id.* The limitations period begins to run on the date of the alleged "unlawful employment practice." *Id.; Delaware State Coll. v. Ricks*, 449 U.S. 250, 257 (1980). When the unlawful employment practice is a discrete event—such as a termination—the limitations period runs from the date of that event. *Ricks*, 449 U.S. at 503-04; *Berry v. Bd. of Supervisors*, 715 F.2d 971, 980 (5th Cir. 1983).

Although there is no statutory exception to the limitations period, this Court recognized that the 300-day filing period, like a statute of limitations, may be subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Accordingly, the courts of appeals recognize a variant of the equitable "continuing violation" doctrine which allows plaintiffs to join time-barred Title VII claims with related claims that are the subject of a timely-filed administrative charge under certain circumstances. *See e.g., Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. March 7, 2001) (No. 00-1937); *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996); *Sabree v. United Brotherhood of Carpenters and Joiners Local* 33, 921 F.2d 396 (1st Cir. 1990); *Roberts v. Gadsen Mem'l Hosp.*, 835 F.2d 793, *as modified at* 850 F.2d 1549 (11th Cir. 1988); *Berry*, 715 F.2d 971.

The most widely accepted approach for analyzing the continuing violation doctrine was articulated by the Fifth Circuit in *Berry*. *Berry*, 715 F.2d at 981. The *Berry* standard permits use of the continuing violation doctrine to save otherwise time-barred claims if the alleged acts are similar, if they are recurring, and if the untimely acts did not have the degree of permanence which would trigger an employee's awareness of and duty to assert his rights. *Id.* The Seventh Circuit's standard as set forth in *Galloway* and adopted by the First and Federal circuit courts of appeals limits the application of the continuing violation doctrine to cases in which "it would have been unreasonable to expect the plaintiff to sue before the statute ran on [the time-barred] conduct." *Galloway*, 232 F.3d at 1014-15. With the exception of the Ninth Circuit, the courts of appeals uniformly refuse to allow the invocation of the doctrine to revive stale claims that a knowing plaintiff allowed to lapse. *See e.g., Provencher v. CVS Pharmacy*, 145 F.3d 5, 14 (1st Cir. 1998); *Roberts*, 835 F.2d 793; *Milton v. Weinberger*, 645 F.2d 1070, 1077 (D.C. Cir. 1981).

In this case, a panel of the Ninth Circuit expressly rejected the Seventh Circuit's continuing violation analysis in *Galloway* and reaffirmed its recent rejection of *Berry*. App., *infra*, 15a. Relying on its decision in *Fielder*, the court of appeals allowed the plaintiff who knowingly permitted numerous claims to lapse to use the continuing violation doctrine to revive those stale claims. *Id.* The court of appeals held that there was no "notice" limitation on the continuing violation doctrine and that a plaintiff was permitted to use the doctrine and recover damages for pre-limitations conduct so long as it is "sufficiently related" to post-limitations conduct. App., *infra*, 15a; 18a. In so doing, the court effectively eradicated Title VII's limitations period.

A. Morgan's Employment At Amtrak[1]

Abner J. Morgan, Jr. ("Morgan"), an African-American male, began working at Amtrak in August 1990 as an electrician's helper in the Oakland Maintenance Yard (the "Yard"). App., *infra*, 7a. Morgan claimed that he believed that he was being hired as an electrician, that he performed the work of an electrician and that less qualified Caucasians were hired as electricians. *Id.* According to Morgan, his job was not reclassified nor his pay increased until April 1992. *Id.*

Morgan claims that shortly after he began working at Amtrak, he was subjected to a pattern of racially discriminatory and retaliatory acts perpetrated by a group of Amtrak managers, specifically Robert Vandenburg, the Facility Manager of the Yard, Jerry Denton, Mike Bordenave, Ray Borge and Earl Geske. App., *infra*, 6a. This conduct allegedly continued throughout his employment with Amtrak and culminated in his termination in March 1995. *Id.*

Morgan testified that the first discriminatory act occurred in February 1991 when he was charged with violating a disciplinary rule for refusing to attend a meeting without union representation. App., *infra*, 7a. Under applicable work rules, an employee is entitled to union representation at any meeting that might lead to disciplinary action. *Id.* at 7a n.4. Morgan was ordered to attend a meeting with Vandenburg and Denton the day after he had called in sick. Believing that

[1] For purposes of ruling on and reviewing the grant of partial summary judgment, the district court and the court of appeals accepted Morgan's statement of facts as true. The court of appeals, however, supplemented Morgan's statement of facts with trial testimony where it favored Morgan. At trial, Amtrak disputed many of the facts relied on by Morgan in opposing summary judgment, and the fully developed trial record demonstrates that many of the allegations were unfounded. For the purposes of this petition, Amtrak is limited to the facts as described by the courts below.

the meeting might lead to disciplinary action, Morgan refused to attend. On March 22, 1991, following a full investigatory hearing into the incident, Morgan was terminated.[2] *Id.* The termination later was reduced to a ten-day suspension and Morgan received back pay for all but ten days. *Id.*

Morgan claims that he requested entrance into the electrician apprentice program in August 1991. App., *infra*, 7a-8a. He claims that he received no official response from Amtrak's personnel office, but that Vandenburg told him that he stood "a snowball's chance in hell of becoming an electrician." *Id.* at 8a.

Morgan recognized early in his employment that the alleged conduct of his supervisors and co-workers could be grounds for legal action. In October 1991, following the termination/suspension and the alleged denial of training, Morgan first complained about racial discrimination at Amtrak. App., *infra*, 28a. Morgan filed a written complaint with Amtrak's internal EEO office citing "blatant racism" and offering specific instances of allegedly discriminatory conduct. *Id.* He sent a copy of this letter to Congressman Dellums. *Id.* Morgan testified that he never received a formal response to this complaint. *Id.*

Throughout the remainder of Morgan's employment at Amtrak, he continued to make complaints of racial discrimination and retaliation both externally and internally to

[2] Morgan's employment was covered by a collective bargaining agreement. App., *infra*, 27a. Therefore, before he could be disciplined for rules infractions, he was entitled to be notified of the charges against him and to have a full investigatory hearing at which he was represented by his union and could present evidence and cross-examine witnesses. *Id.* at 27a n.4. The hearing was conducted by a Hearing Officer who determined whether the charges were proven. If the charges were proven, the Hearing Officer's decision was forwarded to the department head who imposed discipline. *Id.* These determinations were subject to multi-layered review and ultimately could be appealed to the National Railroad Adjustment Board.

Amtrak's EEO office. Morgan and a group of other Amtrak employees met with Congresswoman Boxer to express their concerns about discriminatory conditions at the Yard in late 1991. App., *infra*, 8a. In response to the complaint, Congresswoman Boxer contacted Amtrak's Inspector General, Fred Weiderhold. *Id.* at 40a. Weiderhold visited the Yard three times in 1992. *Id.* On one of these occasions, Weiderhold met Morgan. *Id.* Morgan claims that he "tried repeatedly to bring the continuing discriminatory and retaliatory practices at Amtrak to [Weiderhold's] attention." *Id.*

Morgan also continued to complain about racial discrimination to Amtrak's EEO office. In May 1993, Morgan filed two separate internal complaints alleging racial discrimination and retaliation with Amtrak's EEO office. App., *infra*, 29a; 30a. Morgan claims that in October 1993, Vandenburg assaulted him by placing his hands on Morgan's shoulders, pushing down and whispering in his ear. *Id.* at 10a. Morgan reported the alleged assault to the police and filed a formal complaint with Amtrak's EEO office. *Id.* at 31a. Morgan testified that Amtrak did not investigate his complaint. In January 1994, Morgan again complained about racial discrimination to Amtrak's EEO office following the cancellation of scheduled training. *Id.* at 11a. Again, Morgan claims that Amtrak did not formally respond to the complaint. *Id.* In October 1994, Morgan made his last complaint of racial discrimination to Amtrak's EEO office and again, according to Morgan, no response was forthcoming. *Id.* In sum, by the time Morgan was suspended in February 1995, he had complained about racial discrimination or retaliation at least nine times over the course of four years.

Despite his complaints, Morgan claims that the discrimination and harassment never stopped. Morgan claims that he was subjected to discriminatory or retaliatory discipline on at least ten occasions between October 1991 and the end of his

employment in March 1995. App., *infra*, 8a-12a. This discipline consisted of being issued written and oral counselings, being unfairly charged with rules violations, being suspended and ultimately his employment being terminated. In addition, he claims that he was unfairly denied training on four occasions.

Although Morgan believed that the alleged conduct was discriminatory and unlawful, he nevertheless refrained from filing an administrative charge until February 27, 1995, two days after he was suspended. App., *infra*, 13a. At that time, he filed a charge alleging discrimination and retaliation with the EEOC and cross-filed with the California Department of Fair Employment and Housing. *Id.* On March 3, 1995, following a full investigatory hearing, Morgan was terminated. *Id.* at 12a. On March 8, 1995, Morgan amended his charge to allege that this termination constituted unlawful discrimination and retaliation. *Id.* at 37a. At the time he filed his administrative charge in February 1995, only six allegedly discriminatory incidents fell within the 300-day limitations period.

B. Proceedings Below

The district court granted partial summary judgment in petitioner's favor on all acts of alleged discrimination which occurred more than 300 days before Morgan filed his administrative charge of discrimination. App., *infra*, 38a-40a. The court also granted partial summary judgment on three of Morgan's six timely claims of alleged discrimination: (1) denial of pay for jury duty in June 1994 and January and February 1995, (2) denial of access to review his work file in December 1994, and (3) denial of union representation during a December 1994 meeting—ruling that Morgan failed to establish a prima facie case of discrimination with respect to each of those claims. *Id.* at 49a-50a; 51a. The court held that Morgan failed to establish a prima facie case of discrimination for denial of pay for jury duty because he

offered no evidence that the action was discriminatory or retaliatory. *Id.* at 49a-50a. The district court held that Morgan failed to establish a prima facie case of discrimination relating to the alleged refusal to allow him to review his work file because he could not identify an adverse employment action flowing from that denial. *Id.* at 51a. The district court also held that Morgan could not recover for the alleged denial of union representation at a December 1994 meeting because he never addressed this claim in his opposition to Amtrak's summary judgment motion. *Id.*

In rejecting Morgan's argument that the continuing violation doctrine resuscitated all of his claims dating back to 1991, the district court relied on *Galloway*, 78 F.3d 1164, 1167; *Roberts*, 835 F.2d 793, and *Berry*, 715 F.2d 971, 981. App., *infra*, 38a-40a. The court held that a plaintiff may not recover for conduct that "occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in light of events that occurred later, within the period of the statute of limitations." *Id.* at 39a (quoting *Galloway*, 78 F.3d at 1167). The court held that Morgan was not entitled to invoke the continuing violation doctrine because as early as 1991 he claimed to be the victim of discrimination and retaliation by Amtrak and yet he did not file his administrative charge until 1995.[3] App., *infra*, 39a-40a.

The three remaining claims of alleged discrimination—suspension in September 1994, denial of training in October 1994, suspension in February 1995 leading to termination of Morgan's employment in March 1995—were tried before a

[3] The court, however, did permit Morgan to present evidence at trial of acts occurring prior to the limitations period to the extent they were relevant to his timely claims of discrimination and retaliation. *Id.* at 40a n.9.

jury. App., *infra*, 13a. During the trial, Morgan introduced evidence spanning the entire period of his employment at Amtrak. The jury returned a unanimous verdict in favor of Amtrak on November 8, 1998. Judgment was entered on November 25, 1998. *Id.* Plaintiff appealed on a number of grounds including that the district court erred in granting partial summary judgment to Amtrak with respect to claims occurring more than 300 days prior to the filing of the administrative charge. *Id.* at 6a.

The court of appeals reversed the district court's granting of partial summary judgment holding that the lower court erroneously relied on *Galloway* to reject Morgan's reliance on the continuing violation doctrine. App., *infra*, 15a. Specifically, the court held that it "has never adopted a strict notice requirement as a litmus test for application of the continuing violation doctrine." *Id.* Citing its own decisions in *Fielder*, *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999) and *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1007 (9th Cir. 1998), the court of appeals stated that the relevant inquiry in determining whether to invoke the continuing violation doctrine was whether the pre-limitations conduct at issue is "sufficiently related" to the post-limitations conduct. App., *infra*, at 18a. Using that test, articulated for the first time in *Fielder*, the court of appeals analyzed Morgan's "three distinct Title VII claims . . . discrimination, hostile environment and retaliation" and held that Morgan could rely on the continuing violation doctrine with respect to each of his three claims. *Id.* at 18a-20a. The court of appeals vacated the grant of partial summary judgment and the judgment on the verdict and granted Morgan a new trial on all of his claims. *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted in this matter as the outcome in this case conflicts with decisions of this Court regarding the enforcement of Title VII's limitations

period. In addition, the Ninth Circuit expressly rejected the analyses of the continuing violation doctrine articulated by the Fifth and Seventh circuit courts of appeals. Finally, the Ninth Circuit's decision effectively nullifies Title VII's statute of limitations for a wide array of cases, and thus, is inconsistent with both the statute itself and the purposes behind the limitations period. In this case, the Ninth Circuit openly acknowledged the conflict between the circuits and reaffirmed its adherence to the "sufficiently related" test.

On March 7, 2001, UAL Corporation filed a petition for writ of certiorari seeking review of a decision of the Ninth Circuit court of appeals. *UAL v. Fielder*, 69 U.S.L.W. 3619 (U.S. March 7, 2001) (No. 00-1937) *seeking review of* 218 F.3d 973 (9th Cir. 2000). In *Fielder*, the Ninth Circuit held that in hostile environment and sexual harassment cases, a plaintiff may use the continuing violation doctrine to link timely and untimely Title VII claims whenever the "alleged discriminatory acts [which occurred within Title VII's limitations period] are related closely enough to constitute a continuing violation." *Fielder*, 218 F.3d at 987, (quoting *Green v. Los Angeles County Superintendent Of Schools*, 883 F.2d 1472, 1480-81 (9th Cir. 1989)). In this case, the Ninth Circuit has gone a step farther—holding that its "related closely enough" or "sufficiently related" test is not limited to cases of hostile environment and sexual harassment but applies to all cases of discrimination. App., *infra*, 17a-18a. In both this case and in *Fielder*, the Ninth Circuit applied its holding and allowed plaintiffs to recover for an assortment of very different time-barred claims under a continuing violation theory, notwithstanding their failure to file timely administrative charges challenging conduct which they concluded was unlawful at or shortly after the time it occurred. *Id.; Fielder*, 218 F.3d at 989. Indeed, in this case, the Ninth Circuit acknowledged that its continuing violation test yields results at odds with those in other circuits. It noted that under the *Berry* and *Galloway* tests, the plaintiff in *Fielder* would

not have been able to rely on the continuing violation doctrine to recover because "the harassing behavior was such that a reasonable person would have been on notice that her rights were violated . . ." App., *infra*, 15a.

This case, like *Fielder*, presents the Court with an opportunity to provide guidance as to what events trigger the running of the limitations period under Title VII and when, if ever, a plaintiff can join untimely claims of alleged discrimination with claims that were the subject of a timely charge. Further review is warranted.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE LANGUAGE OF SECTION 706(e) AND SUPREME COURT PRECEDENT HOLDING THAT A DISCRETE EVENT TRIGGERS AN EMPLOYEE'S OBLIGATION TO FILE A CHARGE PURSUANT TO TITLE VII

The Ninth Circuit effectively nullified Title VII's limitations period by permitting recovery for discrete acts of alleged discrimination years after the expiration of the limitations period. There is no statutory basis for this interpretation of Section 706(e). Moreover, the Ninth Circuit's decision expressly conflicts with this Court's rulings that a discrete event triggers the running of the limitations period. Finally, the Ninth Circuit's decision conflicts with the decisions of other courts of appeals which adhere to the rule that a discrete event triggers Section 706(e)'s limitations period. The decision below is erroneous and should be reversed.

Title VII was enacted to "assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race . . ." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). It creates a comprehensive statutory system to vindicate civil rights. *Johnson v. Ry. Express Agency, Inc.* 421 U.S. 454, 455 (1975). That

system includes a limitations period—Section 706(e). Section 706(e) requires employees who believe that they have been subjected to unlawful discrimination to file a claim with an administrative agency prior to proceeding to court. 42 U.S.C. § 2000e-5(e)(1). A claim is time-barred unless the employee files a charge of discrimination with the EEOC within 180 days of the alleged unlawful occurrence, or within 300 days of the allegedly unlawful occurrence if the employee first files the charge with a state or local agency. *Id; United Airlines v. Evans*, 431 U.S. 553, 555 n.4 (1977) (holding that "[t]imely filing is a prerequisite to maintenance of a Title VII action."). If, after 180 days, the EEOC is not successful in obtaining voluntary compliance from the employer and elects not to file suit on behalf of the employee, the employee may demand a right-to-sue letter and institute a private action against the employer. 42 U.S.C. § 2000e-5(f)(1). The employee must institute the lawsuit within 90 days after receiving the right-to-sue letter or risk losing his claim. *Alexander*, 415 U.S. at 47.

Congress defined Title VII's jurisdictional prerequisites "with precision," *Id.*, and there is no statutory exception to this limitations period. The sole statutory extension of Section 706(e)'s limitations period occurs when the "person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from" the alleged discriminatory practice. 42 U.S.C. § 2000e-(5)(e)(1); *International Union of Electrical Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). It is well-settled that where a statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (finding the terms of the statute of limitations applicable because this "is not one of the rare cases in which 'the literal application of the statute will

produce a result demonstrably at odds with the intentions of its drafters.'")); *Hallstrom v. Tillamook County*, 493 U.S. 20, 28 (1989) (noting that the words of the statute are conclusive). The language of Section 706(e) is plain—it provides that a charge of discrimination "shall be filed" with the EEOC within 180 days of the alleged unlawful employment action. 42 U.S.C. § 2000e-5(e)(1). As this Court noted, "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed." *Hallstrom*, 493 U.S. at 31.

Moreover, this Court has ruled that the Title VII limitations period begins to run from the date of the discrete discriminatory act, not from the date the last effect of that act is felt.[4] *Ricks*, 449 U.S. at 257-8; *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (noting that "the proper focus is on the time of the discriminatory act, not at the point at which the *consequences* of the act become painful."); *see also Evans*, 431 U.S. at 558 (noting that the focus is on whether there is a present violation not on whether there are present effects of a past violation.); *Robbins & Myers*, 429 U.S. at 234; *Cf., Havens Realty Co. v. Coleman*, 455 U.S. 363, 381 (1982) (holding that under the Fair Housing Act a tester could not invoke the continuing violation doctrine to recover for "four isolated occasions" on which she was given false information). Accordingly, this Court has rejected attempts to extend the limitations period when a discrete allegedly discriminatory act has put the plaintiff on notice of a potential claim.

For example, in *Robbins & Myers*, the plaintiff believed that she was fired because of her race in violation of both the applicable collective bargaining agreement and Title VII. She promptly filed a grievance with the union alleging unfair action, but waited until after the expiration of Title VII's

[4] Continuity of employment alone is not sufficient to extend the limitations period. *Ricks*, 449 U.S. at 257.

limitations period to file her charge with the EEOC. *Robbins & Myers*, 429 U.S. at 229. The plaintiff conceded that filing her grievance did not prevent her from immediately filing an EEOC charge. *Id.* at 238, n.10. She argued that her charge was timely filed because the alleged unlawful employment practice occurred at the conclusion of the grievance-arbitration proceedings, not on the date of her termination. *Id.* at 238. This Court rejected plaintiff's argument holding that the effective date for purposes of the limitations period was the date of her termination. *Id.* at 234-35.

Likewise, in *Ricks*, this Court rejected a plaintiff's attempt to use the continuing violation doctrine to extend the limitations period to resuscitate his time-barred discrimination claim. *Ricks*, 449 U.S. at 257-58. In *Ricks*, a black Liberian college professor was denied tenure in February 1973. *Id.* at 252. Following a denial of an appeal of the tenure decision, the college's Board of Trustees offered Ricks a one-year terminal contract. *Id.* at 253. Ricks accepted the contract and worked until its expiration in June 1975. *Id.* at 253-54. In April 1975, Ricks filed a charge with the EEOC alleging discrimination based on national origin. *Id.* at 254. The district court held that Ricks' claim was time-barred because the denial of tenure occurred more than 180 days prior to the filing of the EEO charge. *Id.* at 254-55. The court of appeals reversed, holding that the limitations period did not begin to run until June 1975 upon the expiration of the one-year contract. *Id.* at 255-56. This Court reversed and held that for purposes of the limitations period, the inquiry must focus on the date of the allegedly unlawful conduct—the denial of tenure. *Id.* at 256-57. This Court held that the limitations period normally commences when the employer's decision is made even when the effects of that decision linger for some time thereafter. *Id.* at 261.

The Ninth Circuit's decision clearly conflicts with this Court's rulings in *Ricks* and *Robbins & Myers*, and with the

decisions of the other circuit courts of appeals.[5] The Ninth Circuit's "sufficiently related" test effectively eliminates the limitations period in any case in which an alleged act of discrimination occurs within the 300 days prior to plaintiff filing an EEO charge. In this case, the first alleged act of discrimination occurred in February 1991, when Amtrak initially terminated Morgan.[6] App., *infra*, 7a.. Shortly after that termination, Morgan complained that he was the victim of racial discrimination and specifically cited the termination as an example of discrimination. *Id.* at 8a. This Court's rulings mandate that the limitations period for that termination runs from the date of the termination. Likewise,

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[5] With the exception of the Ninth Circuit, the courts of appeals have followed this Court's precedent and have held that discrete events such as denial of promotion, denial of training, and termination trigger the running of Title VII's limitations period for such events even in cases in which the plaintiff alleges subsequent discriminatory acts. *See e.g., High v. Univ. of Minnesota*, 236 F.3d 909 (8th Cir. 2000) (finding failure to promote is a discrete event triggering the limitations period); *Stewart v. Booker T. Washington Inst.*, 232 F.3d 844, 850 (11th Cir. 2000) (precluding use of continuing violation doctrine as denial of transfer is a discrete event triggering the limitations period); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310 (10th Cir. 1999) (finding refusal to hire is a discrete event triggering limitations period; claim could not be revived by combining it with timely refusal to hire claim); *Huckabay v. Moore*, 142 F.3d 233, 239-40 (5th Cir. 1998) (preventing combining stale demotion and failure to promote claims with timely harassment claims as, "demotion is the sort of discrete and salient event that should put an employee on notice that a cause of action has accrued"); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483-84 (3d Cir. 1997) (holding failure to promote and denial of training claims are discrete events that "cannot be regarded as having been timely by reason of [plaintiff's] other allegations of discriminatory treatment."); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167 (8th Cir. 1995) (en banc); *Cf., West v. Philadelphia Elec. Co.*, 45 F.3d 744, 756 (3d Cir. 1995) ("[T]he harassment did not cause a discrete event such as a lost job or a denied promotion and, thus did not trigger a duty of the plaintiff to assert his rights arising from the deprivation").

[6] This termination was later reduced to a suspension. App., *infra*, 7a.

other discrete events complained of by Morgan—including denial of training and failure to promote—should trigger the 300-day limitations period for those events. The Ninth Circuit, however, ignored precedent and permitted Morgan to use the continuing violation doctrine and reach back four years to resuscitate his stale claims. In fact, under the Ninth Circuit's analysis, the plaintiffs in *Robbins & Myers* and *Ricks* both would have been permitted to recover for any allegedly discriminatory event stretching back to the beginning of their employment. The Ninth Circuit's decision conflicts with this Court's precedent and is erroneous. This Court should intervene to correct this decision.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS' AND THE SUPREME COURT'S LIMITED APPROACH TO THE CONTINUING VIOLATION DOCTRINE

Shortly after the passage of Title VII, the courts began to recognize a judicially-created continuing violation exception to Title VII's short limitations period in cases where a defendant's conduct was deemed continuing in nature. *See e.g., Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977); *Richard v. McDonnell Douglas Co.*, 469 F.2d 1249 (8th Cir. 1972); *Cox v. United States Gypsum Co.*, 409 F.2d 289, 290-91 (7th Cir. 1969). In these cases, the courts used the continuing violation doctrine to allow plaintiffs to recover based on acts that otherwise would be time-barred. The continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated. *Alldread v. City of Grenada*, 988 F.2d 1425, 1432 (5th Cir. 1993). This Court tacitly approved the use of the continuing violation doctrine under certain circumstance when it held that Title VII's

limitations period may be subject to waiver, estoppel and equitable tolling. *Zipes*, 455 U.S. 385.

Early development of the continuing violation doctrine was aptly described as "inconsistent and confusing." *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 977 (5th Cir. 1980). This confusion continues today. The courts of appeals have interpreted the doctrine in widely divergent ways and apply different standards to interpret similar facts resulting in contradictory outcomes. The widespread inconsistency and confusion has been recognized by both the courts and commentators. *See Galloway*, 78 F.3d at 1165 ("The question when conduct occurring outside the statute of limitations may, by virtue of its link with recent conduct, be made a basis for a legal claim is a vexing one . . ."); Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531 (2000) (describing the "increasingly complex and divergent application of the continuing violation doctrine in sexual harassment and other types of employment discrimination cases."); 2 Barbara Lindemann & Paul Grossman, Employment Discrimination Law 1351 (3d ed. 1996) (citing the continuing violation doctrine as "the most muddled area in all of employment discrimination law"); R.L. Paetzold & A.M. O'Leary-Kelly, *Continuing Violation and Hostile Environment Sexual Harassment: When is Enough, Enough?*, 31 Am. Bus. L.J. 365, 382-83 (1993) (noting that "[b]ecause of the limited guidance from the U.S. Supreme Court, the federal circuits have adopted different standards for implementing the continuing violation doctrine"); T. Crivens, *The Continuing Violation Theory and Systematic Discrimination: In Search of a Judicial Standard for Timely Filing*, 41 Vand. L. Rev. 1171, 1172 (1988) (stating that the continuing violation doctrine is "one of the most confusing theories in employment discrimination law. . .").

Prior to the Ninth Circuit's decisions in this case and *Fielder*, the courts of appeals agreed that use of the

continuing violation doctrine was inappropriate in cases where the plaintiff was aware of the discriminatory nature of the acts at the time they were taking place. *See e.g., Garrison v. Burke*, 165 F.3d 565 (7th Cir. 1999); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996); *Webb v. Cardiothoracic Surgery Ass'n.*, 139 F.3d 532, 538 (5th Cir. 1998); *Purrington v. Univ. of Utah*, 996 F.2d 1025 (10th Cir. 1993); *Sabree*, 921 F.2d 396. The Ninth Circuit has now explicitly rejected the analyses used by other circuits. As such, review by this Court is necessary to establish uniformity in the application of the continuing violation doctrine.

A. The Ninth Circuit's Decision Conflicts With Decisions Of Every Other Circuit Court That Has Decided The Issue.

The decision below is in direct conflict with, and rejects the analyses of, both the Seventh Circuit in *Galloway*, 78 F.3d at 1167 and the Fifth Circuit in *Berry*, 715 F.2d 971. In *Galloway*, the Seventh Circuit held that a plaintiff may not rely on the continuing violation doctrine "unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Galloway*, 78 F.3d at 1167. In arriving at this conclusion, the Seventh Circuit balanced the competing social interest in "encouraging the prompt filing of claims and by doing so of enhancing the likelihood of accurate determinations and removing debilitating uncertainty about legal liabilities," with equitable interest in protecting a plaintiff who files a Title VII charge as soon as he is aware that his rights have been violated. *Id.* at 1165; 1166.

In *Berry*, the Fifth Circuit adopted a three-factor analysis to balance these competing interests. *Berry*, 715 F.2d at 979-980. Under the Fifth Circuit's analysis, before being

permitted to use the continuing violation doctrine, a plaintiff must show first that the acts involve the same type of discrimination, and second, that they are recurring rather than an isolated work assignment or employment decision. The third factor, which the Fifth Circuit considers the most important, is whether the early untimely act had "a degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights" or which should indicate that the discrimination will continue "without being dependent on a continuing intent to discriminate . . ." *Id.* at 981. If the early untimely act is sufficiently permanent in nature, a plaintiff is not permitted to rely on the continuing violation doctrine.

Under both the *Berry* and the *Galloway* analyses, the continuing violation doctrine cannot be used by a plaintiff who knows that he is a victim of discrimination, but fails to file a charge within the limitations period. *See Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 612 (1st Cir. 2000) (holding handwritten note by plaintiff identifying acts as discriminatory written over a year before the charge filed precluded plaintiff from relying on the continuing violation doctrine); *Provencher*, 145 F.3d at 15 (holding plaintiff's admission that he knew he was being harassed long before he filed charge precluded invocation of the continuing violation doctrine); *Van Zant*, 80 F.3d at 713 (stating that the timeliness of a discrimination claim is to be measured "from the date the claimant had notice of the allegedly discriminatory action"); *Webb*, 139 F.3d 532, 538 (holding that plaintiff was precluded from relying on continuing violation doctrine where she admitted that she knew she was being harassed and failed to file a timely charge).

Although the Ninth Circuit distinguished *Berry* in its decision in *Fielder* on the basis that *Berry* was an equal pay and gender discrimination case, *Fielder*, 218 F.3d at 987 n.10,

it dropped any pretense of distinguishing *Berry* and *Galloway* in this case. App., *infra*, 15a. Here, the court of appeals rejected both *Berry* and *Galloway* and held that Ninth Circuit precedent "precludes such a notice limitation on the continuing violation doctrine." *Id.* Indeed, the Ninth Circuit's "sufficiently related" test does not balance the competing interests recognized in *Berry* and *Galloway*. Under the Ninth Circuit's test, the societal interest in promoting prompt filing of claims is absent and the scales tip entirely in favor of allowing plaintiffs to combine timely and untimely claims without regard to the existence of the limitations period. In fact, the Ninth Circuit's decision permits a plaintiff who knew that his rights were being violated to sit on his rights indefinitely. App., *infra*, 15a. As Judge Kleinfeld noted in his dissent in *Fielder*, "[t]he practical consequence of the majority opinion is to keep alive incidents of claimed [discrimination] permanently, with no statute of limitations at all." *Fielder*, 218 F.3d at 990. This is precisely the outcome that the *Berry* and *Galloway* courts sought to avoid.

Despite the Ninth Circuit's rejection of the *Berry* and *Galloway* analyses, other courts of appeals have adopted these two analyses.[7] The Third, Sixth, Tenth and Eleventh Circuits apply the *Berry* factors in determining whether use of

[7] The Eighth Circuit is the only other circuit with case law resembling the Ninth Circuit's "sufficiently related" test. However, the Eighth Circuit does not appear to have adopted a uniform standard for analyzing continuing violations. *Compare Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1303 (8th Cir. 1997) (holding that when a plaintiff alleges an ongoing practice or pattern of discrimination, a continuing violation is present "if the plaintiff established that *any violation* took place" during the statutory period) (emphasis added) *with Klein v. McGowan*, 198 F.3d 705, 709 (8th Cir. 1999) (requiring a plaintiff to show "some incident of harassment" occurring within the limitations period and a "sufficient nexus" between the incident and the other incidents of harassment), (citing *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995)).

the continuing violation doctrine is appropriate.[8] These courts of appeals—like the Fifth Circuit—consider the third factor, permanence, to be the most important. *See West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 & n. 9 (3d Cir. 1995); *Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1415 & n. 6 (10th Cir. 1993); *Bell v. Chesapeake & Ohio Ry.*, 929 F.2d 220, 223-25 (6th Cir. 1991); *Roberts v. Gadsen Mem'l. Hosp.*, 835 F.2d 793, 801 (11th Cir. 1988). The Second Circuit, while not expressly adopting the *Berry* analysis, uses a similar standard to determine whether a continuing violation exists. The Second Circuit asks whether the instances of discrimination are "specific and related" and the plaintiff must be without notice of the discriminatory nature of events when they occur. *See e.g., Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569 n.4 (2nd Cir. 2000); *Van Zant*, 80 F.3d at 713. The First and Federal Circuits have adopted the Seventh Circuit's *Galloway* approach. *See O'Rourke v. City of Providence*, 235 F.3d 713, 731-33 (1st Cir. 2001); *Provencher v. CVS Pharmacy*, 145 F.3d 5, 14-15 (1st Cir. 1998); *Sabree*, 921 F.2d 399-400; *Bosley v. Merit Sys. Prot. Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998). There is no doubt that under the analyses adopted by any of these courts, Morgan's continuing violation claim would have failed. Not only did Morgan believe himself to be the victim of racial

[8] The District of Columbia Circuit has not explicitly adopted *Berry* or *Galloway*, but cites both analyses with approval. *See Curry v. District of Columbia*, 195 F.3d 654, 661 n.14 (D.C. Cir. 1999) *cert. denied*, 530 U.S. 1215 (2000) (citing *Sabree*, 921 F.2d at 401-02); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 483 (3d Cir. 1997); *West*, 45 F.3d at 755-56; *Berry*, 715 F.2d at 981. The Fourth Circuit, likewise, has "never delineated what constitutes a 'continuing violation,'" but it cites with approval to the Fifth and Seventh Circuits' analyses. *Emmert v. Runyon*, No. 98-2027, 1999 WL 253632 at *4 (4th Cir. Apr. 29, 1999). Moreover, the district court for the District of Maryland relies on *Berry* describing it as "[a] useful analysis of the [continuing violation] theory borrowed from the Fifth Circuit but consistent with Fourth Circuit precedent." *Seward v. Harford County*, 2001 WL 283090, at *4 (D. Md. March 13, 2001).

discrimination four years prior to filing his charge, he also complained about racial discrimination to Amtrak's management, Amtrak's internal EEO office and members of Congress.

The Ninth Circuit openly acknowledged the conflict it created between the circuits by adopting its "sufficiently related" standard and explicitly rejecting *Galloway* and *Berry*. App., *infra*, 15a. This conflict has also been recognized by the First Circuit in *O'Rourke* when it reaffirmed its adherence to its own analysis consistent with *Berry* and recognized that "only the Ninth Circuit has taken a different position . . ." 235 F.3d at 731 n.6; *see also Salgado v. City of New York*, 2001 WL 290051, at *6 n.2 (S.D.N.Y. March 26, 2001) (acknowledging conflict). The "inconsistency and confusion" surrounding the continuing violation doctrine will increase exponentially as a result of the Ninth Circuit's decision below. It is time for this Court to intervene and resolve the conflict.

B. The Ninth Circuit's Decision Conflicts With This Court's Rulings on The Continuing Violation Doctrine

The Ninth Circuit's decision also is inconsistent with this Court's precedent regarding the continuing violation doctrine. This Court adheres to the proposition that statutes of limitation are to be strictly enforced. Statutes of limitation have been characterized as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938). This Court noted that "[s]tatutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice" of the right to defend himself. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citing *Wood v. Carpenter*, 101 U.S 135, 139 (1879)). Statutes of limitations are "statutes of repose" which balance plaintiffs'

needs for ample time to pursue claims with defendants' and courts' rights to be free of stale claims. *Id.* at 117; *Order of Railway Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965). This Court described the purposes behind statutes of limitations as "promot[ing] justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared . . . even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railway Telegraphers*, 321 U.S. at 348-49.

This Court repeatedly has recognized that Title VII's limitations period facilitates the delicate balance between the interests of the employee in protecting his civil rights, the societal interest in promoting prompt filing of discrimination claims thereby enhancing the likelihood of accurate determinations, and the employer's interest in being protected from untimely claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (noting that limitations periods are "intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights"); *Ricks*, 449 U.S. at 259-60 (noting that "it should not be forgotten that time-limitations provisions themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'") (citation omitted); *Evans*, 454 U.S. at 559 (noting that employer is "entitled to treat that past [discriminatory] act as lawful after [the employee] failed to file a charge of discrimination" within the limitations period.); *Robbins & Myers*, 429 U.S. at 240 (noting that "[a]dherence to the limitations period assures prompt

notification to the employer of a charge of an alleged violation of Title VII . . ."). Thus, this Court expressly has rejected equitable tolling rules that would extend the limitations period for plaintiffs who knowingly fail to assert their rights pursuant to Section 706(e).[9] *Ricks*, 449 U.S. at 257-8; *Chardon*, 454 U.S. at 8; *Evans*, 431 U.S. at 558; *Robbins & Myers*, 429 U.S. at 239-40.

For example, in *Robbins & Myers*, this Court rejected an employee's argument that the Title VII limitations period was tolled during the pendency of a grievance procedure challenging her allegedly discriminatory and unfair termination. *Robbins & Myers*, 429 U.S. 229. The employee filed a grievance pursuant to the applicable collective bargaining agreement two days after her termination challenging it as "unfair." However, she waited until after the grievance procedure was complete and after the Title VII limitations period had run to file her charge with the EEOC. *Id.* at 231-32. In arguing that Title VII's statutory limitations period should be tolled during the pendency of grievance/arbitration proceedings, the employee noted that any delay would be minimal and that failure to permit such tolling might force an

[9] Likewise, this Court has rejected an equitable tolling rule when a plaintiff tried to rely on Title VII to extend the limitations period for his Section 1981 claim. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the plaintiff filed a timely charge with the EEOC alleging race discrimination. More than three years later, the EEOC issued a right to sue letter. Plaintiff filed suit alleging violations of both Title VII and Section 1981. He argued that the one-year limitations period applicable to his Section 1981 claim was tolled during the pendency of the processing of his Title VII claim by the EEOC. This Court rejected plaintiff's arguments and held that the one-year limitations period on his Section 1981 claim had expired. This Court held, "plaintiff has slept on his § 1981 rights. The facts that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent . . . We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." 421 U.S. at 466.

employee into court prematurely. This Court, citing its decisions in *Alexander*, 415 U.S. 36 and *Johnson*, 421 U.S. 454, reaffirmed the independence of remedies under a collective bargaining agreement and Title VII and held that:

> Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight.' *Id.* at 240 (citation omitted).

This Court has also rejected attempts by plaintiffs who knowingly permitted the limitations period to expire to use the continuing violation doctrine to salvage stale claims. As discussed above, the Court rejected the plaintiff's attempt to use the continuing violation doctrine to extend Title VII's limitations period in *Ricks*. *Ricks*, 449 U.S. 252. There the plaintiff argued that the continuing violation doctrine should apply to save his discriminatory denial of tenure claim in part because a number of "unusual incidents"—including an alleged assault by the department chairman—occurred between the denial of tenure and his termination over a year later. *Id.* at 257 n. 8. This Court noted, "[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Id.* at 256-57 (citation omitted). Accordingly, this Court rejected plaintiff's reliance on the continuing violation doctrine and held that his claim was time-barred. *See also Evans*, 431 U.S. 553 (rejecting plaintiff's reliance on continuing violation doctrine to save discriminatory seniority claim where the allegedly discriminatory policy had been discontinued years earlier and plaintiff's claim was based on the current effects of the past policy).

Under the Ninth Circuit's "sufficiently related" test, the plaintiff in *Ricks* would have been able to recover without regard for the limitations period because some act had occurred within the 300 days prior to his filing of the administrative charge. Indeed, in almost every conceivable case, the Ninth Circuit would allow a plaintiff to salvage time-barred claims by relying on the continuing violation doctrine to link untimely claims with timely claims. The Ninth Circuit has rendered Section 706(e)'s limitations period a nullity. The Ninth Circuit's disregard for this limitations period serves none of the meritorious purposes underlying statutes of limitations. It undermines the language of Title VII, the purposes behind Section 706(e)'s limitations period and the delicate balance that is served by statutes of limitations. For all these reasons, the Ninth Circuit's decision is wrong and conflicts with the decisions of this Court and decisions of the other circuit courts of appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15374
D.C. No.
CV-96-03585-SYI
OPINION

ABNER J. MORGAN, JR.,
Plaintiff-Appellant,
v.

NATIONAL RAILROAD PASSENGER CORPORATION, dba AMTRAK,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
June 14, 2000—San Francisco, California
Filed November 8, 2000

Before: Donald P. Lay,[1] Dorothy W. Nelson and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Lay

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[1] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals reversed a judgment of the district court and remanded for a new trial. The court held that when an employer's pre-limitations period discriminatory conduct is part of a series or pattern of discrimination, retaliation, and hostile environment, the continuing violation doctrine applies and the pre-limitations period conduct should be presented to the jury for purposes of liability.

Appellant Abner Morgan, an African-American male, applied for a job with appellee Amtrak in 1990. From the date of his hire to his termination five years later, Morgan was subject to numerous disciplinary actions, including written and verbal counselings and suspensions from work without pay, allegedly for rules violations and absenteeism. On several occasions, Morgan requested and was denied career opportunities with Amtrak.

Morgan made numerous complaints to Amtrak's Equal Employment Office and external authorities alleging discriminatory conduct throughout his tenure with Amtrak. Often, Morgan never received an official response to his complaints and an allegedly unrelated discipline was leveled against him within a short period.

In February 1995, after his suspension but prior to his termination, Morgan filed a charge of discrimination against Amtrak with the Equal Employment Opportunity Commission (EEOC). EEOC issued a right to sue letter and Morgan filed suit against Amtrak in federal court alleging violations of Title VII of the Civil Rights Act including discrimination, retaliation and a hostile work environment. Amtrak moved for summary judgment, arguing that it was

entitled to judgment on all incidents that occurred more than 300 days before the filing of Morgan's EEOC charge

The district court granted summary judgment in part to Amtrak, holding that Amtrak could not be liable for conduct that occurred prior to May 3, 1994, because such conduct was outside the 300-day limitations period.

A trial proceeded on the remaining allegations. Morgan presented the testimony of several witnesses, fellow Amtrak employees, who testified about the racially-laden atmosphere at the Amtrak yard where Morgan worked. Evidence was presented that Amtrak supervisors used racial epithets, made racially derogatory comments and performed racially derogatory acts.

The jury returned a verdict in favor of Amtrak. Morgan appealed the district court's grant of summary judgment to Amtrak as to conduct that occurred prior to May 3, 1994.

Before a suit may be filed under Title VII, a plaintiff must file a complaint with the EEOC within 180 or 300 days. Title VII's limitation period limits liability to conduct occurring within the applicable limitations period; the continuing violations doctrine, however, allows courts to consider conduct that would ordinarily be time barred as long as the untimely incidents represent an ongoing unlawful employment practice.

A plaintiff can establish a continuing violation by showing a series of related acts one or more of which are within the limitations period—a serial violation; or by showing a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation.

To survive summary judgment after failing to satisfy the limitations period requirement, Morgan had to raise a genuine issue of disputed fact as to 1) the existence of a continuing

violation, and 2) that the violation continued into the limitations period.

The pre-limitations conduct was sufficiently related to the post-limitations conduct to invoke the continuing violation doctrine. The district court erred in granting a partial summary judgment holding that Amtrak could not be liable for conduct occurring prior to May 3, 1994.

To prove racial discrimination, Morgan had to show that he belonged to a class protected by Title VII, was qualified for the position in question, and suffered an adverse employment action. The incidents of questionable disciplines and counselings, and denied career opportunities, taken together with the abundant evidence of the racially discriminatory atmosphere at the yard were sufficiently related to the alleged incidents of discrimination that occurred within the limitations period. These incidents revealed a consistent pattern of similar employment actions over the entire five-year employment period, perpetuated by the same core group of managers.

The pre-and post-limitations period incidents involved the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers. In light of this, there was sufficient evidence to employ the continuing violation doctrine and allow the jury to consider the whole of Morgan's tenure for purposes of liability on his hostile environment claim.

To establish a prima facie case for retaliation, a plaintiff must show: he has engaged in a protected activity; he has suffered an adverse employment decision; and there was a causal link between the protected activity and the adverse employment decision.

The pre-limitations conduct was sufficiently related to the conduct within the limitations period so that the continuing

violation doctrine worked to allow a jury to find liability on Morgan's retaliation claim.

Viewed in the context of the totality of Morgan's relationship with Amtrak, the pre-limitations events were part of a series or pattern of discrimination, retaliation, and hostile environment that started nearly contemporaneously with Morgan's employment and continued throughout his tenure. In light of the relatedness of the incidents, Morgan sufficiently presented a genuine issue of disputed fact as to whether a continuing violation existed. Pre-limitations period conduct should have been presented to the jury not merely as back-ground information, but also for purposes of liability.

COUNSEL

Pamela Y. Price, Price and Associates, Oakland, California, for the plaintiff-appellant.

Kay M. Long-Martin and Theodora R. Lee, Littler Mendelson, Oakland, California, for the defendant-appellee.

OPINION

LAY, Circuit Judge:

Abner J. Morgan, Jr. (Morgan) filed suit against National Railroad Passenger Corporation (Amtrak), alleging violations of Title VII of the Civil Rights Act of 1964, as amended in 1991. *See* 42 U.S.C. § 2000e *et seq.* (Title VII). Morgan claims that, because of his race, he suffered discrimination and retaliation, and endured a hostile work environment. The district court granted partial summary judgment in favor of Amtrak, holding that Amtrak could not be liable for conduct occurring prior to May 3, 1994. A trial was held on the remaining allegations, and the jury returned a verdict in favor

of Amtrak. Morgan now appeals both the ruling on summary judgment and the judgment rendered on the jury verdict.

With regard to the grant of partial summary judgment, Morgan argues the district court erred in limiting the liability time frame. As to the judgment on the jury verdict, Morgan asserts the district court erred in four ways: 1) instructing the jury that evidence of pre-limitations period conduct was for "background" or "context" only; 2) excluding certain testimony by Morgan and co-workers regarding the racially hostile environment;[2] 3) improperly instructing the jury on the hostile environment claim; and 4) imposing improper time limits on the presentation of Morgan's case.[3] We find the district court erred in entering judgment as a matter of law. Thus, we reverse and remand for a new trial.

I. BACKGROUND

A) *Factual Background*

Morgan, an African-American male, alleges that from the beginning of his employment with Amtrak, and throughout his tenure, he was subjected to discriminatory and retaliatory acts and endured a racially hostile work environment. He alleges that the managers at the Oakland Maintenance Yard (the Yard), specifically, Robert Vandenburg, Ray Borge, Jerry Denton, Earl Geske, and Mike Bordenave, primarily perpetrated the acts. As we must, we construe the facts in the light most favorable to Morgan.

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[2] The district court excluded portions of testimony by Morgan and Mary Fontaine, and it excluded all of Joe George's testimony.

[3] At trial, Morgan's first witness was to be Joe George; however, as noted *supra*, the district court excluded his testimony in its entirety. Morgan's attorney requested a continuance to prepare Morgan, who was to be the next witness. The court indicated that if a continuance was granted, time would be deducted from the overall time allotted for the case. Morgan took the stand immediately.

1) Incidents Prior To the Limitations Period

Morgan applied for a job with Amtrak in 1990. Although trained and experienced in electrical work, Morgan began working in August 1990 as an "Electrician Helper." Morgan asserts he believed he was being hired as an electrician, from the beginning he performed the work of an electrician, and that less qualified Caucasians were hired as electricians. Morgan is the only person ever hired as a "helper" at the Yard. Eventually, Morgan's position was reclassified and his pay brought in line with that of electricians in April 1992.

In February 1991, Vandenburg and Denton instructed Morgan to attend a meeting in Vandenburg's office. Fearing the meeting might lead to disciplinary action because he had recently called in sick, Morgan refused to attend without union representation.[4] Vandenburg and Denton then charged Morgan with a Rule L violation for refusing to follow orders and attend the meeting.[5] Following a hearing, Morgan was terminated for this violation. Morgan filed a grievance and, in response, Amtrak reinstated him, reducing the termination to a suspension and paying him for all but ten days. Amtrak's Inspector General testified at trial that this ten-day suspension was the most severe discipline imposed on an employee from 1989-1992.

In August of 1991, Morgan made a written request to Amtrak's Los Angeles personnel office asking to participate in Amtrak's apprenticeship program. Within days of filing

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[4] Under the collective bargaining agreement in place at the time, Amtrak employees had a right to union representation at meetings which might lead to disciplinary action.

[5] Rule L prohibits insubordination and provides in relevant part, "[e]mployees must obey instructions, directions and orders from Amtrak supervisor personnel and officers, except when confronted by a clear and immediate danger to themselves, property or the public. Insubordinate conduct will not be tolerated."

such request, Vandenburg told Morgan he stood "a snowball's chance in hell of becoming an electrician" at his yard. He never received a written response from Amtrak's Los Angeles office.[6]

In early October 1991, Morgan sent a letter complaining of race discrimination to Amtrak's Equal Employment Office (EEO) and copied it to his congressperson. Morgan never received a formal response to this complaint from Amtrak. On October 16, 1991, Denton gave Morgan a written counseling for violating Rule L because he ignored a direct order to desist while helping an escorting officer pack a co-worker's belongings. Morgan immediately protested this counseling, alleging that it was racially motivated.

In the fall of 1991, Morgan and other employees met with their congresswoman to complain about conditions at the Yard. Shortly after this meeting, on December 13, 1991, Vandenburg placed a letter of counseling in Morgan's file, accusing him of being argumentative and threatening. Early in 1992, the congresswoman contacted Amtrak regarding the employee complaints. In response, Amtrak's Inspector General conducted an investigation of the Yard. Amtrak insists that a list of primary concerns was then drafted and improvements made. At trial, however, Amtrak's EEO representative responsible for the Yard during the relevant time period denied knowledge of the investigation.

On September 17, 1992, Vandenburg and Borge counseled Morgan for alleged absenteeism. Morgan contends that the charged absenteeism included several months of previously approved leave, which had been granted so that he could care for his son.

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[6] Amtrak insists that Morgan was scheduled to go through the program the following year but the program was discontinued prior to his admission.

On September 19, 1992, Mike Fabian, an Amtrak foreman, ordered Morgan to clean up tar on one of the tracks. This work was outside of Morgan's job description. Then, on November 29, 1992, Morgan was again assigned a task outside his craft, specifically, Geske assigned him the task of picking up tie wraps.[7] Morgan asserts that he picked up as many tie wraps as possible during his shift, but he could not possibly pick up all of them. Regardless, on December 1, 1992, Geske gave Morgan a written counseling for a Rule L violation for failing to pick up all of the tie wraps.

In April 1993, Morgan received another written counseling from Denton for absenteeism. This counseling targeted Morgan's tardiness and attendance on three days—including one excused absence. This counseling occurred despite a recommendation from Amtrak's Inspector General that management should not be strict with regard to minor absenteeism.

In May 1993, Morgan requested, first verbally and then in writing, a one-day leave of absence, in addition to the eight days of vacation for which he was scheduled. Vandenburg denied the requests. Morgan did not appear at work on the day in question. As a result, Morgan was charged with a Rule L violation and suspended for fifteen days. Morgan filed a letter of complaint with Amtrak's EEO office and his union. Eventually, Morgan received back pay and the suspension was ordered expunged from his file.

On May 25, 1993, Morgan asked Vandenburg, in writing, why his name was removed from the list of employees scheduled to be trained on heating, air, and ventilation systems. On that same day Morgan filed a written complaint with Amtrak's EEO office alleging ongoing racial discrimination and retaliation. Then on May 30, 1993,

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[7] Amtrak asserts everyone was assisting in a general cleanup in preparation for an audit; however, no other employee testified to having to perform these specific tasks on the same occasion.

Morgan filed another written complaint with Amtrak' s EEO office.

In September 1993, Vandenburg received a letter requesting an investigation of an alleged conversation during which Morgan made improper comments to a union representative. A preliminary investigation confirmed that a conversation had occurred.[8] Morgan, however, would not discuss the incident with Vandenburg and instead asked for a formal investigation. In October 1993, Morgan was charged with violating Rules F-1 and F-3.[9] After an investigatory hearing, the charges against Morgan were dropped and the incident ordered expunged from his record.

During a training session in October 1993, Vandenburg physically touched Morgan. The contact consisted of Vandenburg approaching from behind, placing his hands on Morgan's shoulders, pushing down, and whispering in his ear. Interpreting the contact as an assault, Morgan reported the incident to the Southern Pacific police, the Oakland police, and filed a written complaint with Amtrak's EEO office. Morgan asserts that Amtrak did not investigate or respond to the situation.

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[8] The conversation between Morgan and the union representative was overheard by another employee. Apparently, this employee's recollection initially supported the union representative's position but later changed to corroborate Morgan's version. At trial the employee testified that a number of supervisors pressured him to change his statement to support the union representative. Specifically, he testified that Vandenburg stated, "Abner was a problem employee, and that they were going to fire him anyways [sic]."

[9] Rule F governs employee conduct. Rule F-1 states: "All employees are required to conduct themselves in a courteous and professional manner in dealing with the public and other Amtrak employees. Boisterous conduct or horseplay and profane or vulgar language are prohibited." Rule F-3 states: "Conduct involving dishonesty, immorality, or indecency is prohibited. Employees must conduct themselves on and off the job so as not to subject Amtrak to criticism and loss of goodwill."

In December 1993, Morgan's scheduled training was cancelled. In January 1994, Morgan wrote a letter to Amtrak's EEO complaining of such cancellation. Morgan asserts that Amtrak never formally responded.

In January 1994, Morgan called in sick to work for one day. When he returned, Borge and other supervisors required him to produce a doctor's note before he could return to work. Despite the fact a note was not required under Amtrak's sick leave policy, when he could not produce a note Morgan lost three days of pay. After filing a grievance, Amtrak paid Morgan for the lost days, excluding the one sick day.

2) Incidents Within the Limitations Period

On September 2, 1994, Morgan was assigned to work on multiple trains. At the end of his shift Morgan had completed work on only one of the trains. Morgan's immediate supervisor spoke with him about not finishing the work and he was subsequently charged with a Rule L violation for failing to complete work assigned to him. Morgan argues that turning over unfinished work to the next shift was not uncommon. There was an investigatory hearing and Morgan was suspended for fifteen days.[10]

In October 1994, Morgan was again denied training and complained to Amtrak's EEO office regarding the cancellation of such training. He received no response.

In December 1994, Morgan was accused of threatening Bordenave during a meeting. Despite investigation, the allegation was unsubstantiated and no action was taken against Morgan.

On February 4, 1995, Bordenave reported to Denton that Morgan had threatened him. Morgan paints a different picture. He asserts that Bordenave falsely claimed he had

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[10] This suspension was affirmed on appeal to the National Railroad Adjustment Board.

been threatened and that when ordered into Denton's office, he asked for union representation or the presence of a co-worker as a witness. Denton denied both, ordered everyone out of the office, and yelled at Morgan to get his "black ass" into the office. Morgan refused and went home. As a result of the incidents. Morgan was suspended and charged with violations of Rules L and F. An investigatory hearing was held and on March 3, 1995, Morgan was terminated.

3) Overall Environment

Morgan presented evidence from a number of fellow Amtrak employees regarding the racially-laden atmosphere at the Yard. Specifically: 1) Art Conley, a former manager, testified that Borge made racial jokes, used the "n" word, performed racially derogatory acts in front of Vandenburg, and that Vandenburg made negative comments regarding African-Americans' capacity to be supervisors; 2) two African-American Amtrak supervisors testified to Borge's racially offensive conduct; 3) two African-American co-workers testified Denton made racially derogatory comments; 4) a number of other witnesses testified to hearing Denton and Bordenave use racial epithets; 5) Joe George, a former employee, was to testify Vandenburg made racially derogatory comments and referred to him as "boy", and that Geske made racially derogatory statements, including that he would kill his daughter before he would allow her to date a black man; [11] and 6) Mary Fontaine, a former employee, testified to the demeaning manner in which Denton treated African-Americans and to racial slurs she heard.[12]

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[11] As noted *supra*, the district court entirely excluded George's testimony because Morgan had not properly submitted an offer of proof in the pre-trial report and because such testimony was cumulative and more prejudicial than probative.

[12] At trial, the district court excluded two other pieces of Fontaine's testimony. First, the district court excluded testimony of her knowledge of Denton's comment regarding working "niggers to death" because such testimony was hearsay and was more prejudicial than probative. Second, the district court excluded her testimony regarding disparate discipline based on race because it was beyond the scope of the case.

B) *Procedural Background*

On February 27, 1995, after his suspension but prior to his termination, Morgan filed a charge of discrimination and retaliation against Amtrak with the Equal Employment Opportunity Commission (EEOC) and cross-filed with the California Department of Fair Employment and Housing. On July 3, 1996, the EEOC issued a "Notice of Right to Sue" and Morgan filed the instant lawsuit on October 2, 1996. Amtrak filed a Motion for Summary Judgment, arguing in part that it was entitled to judgment on all incidents that occurred more than 300 days before the filing of Morgan's EEOC charge.[13]

On September 11, 1998, the district court granted in part Amtrak's Motion for Summary Judgment, holding that Amtrak could not be liable for conduct that occurred prior to May 3, 1994, because such conduct was outside the applicable 300-day limitations period. The district court went on to find that Morgan had raised a genuine issue of material fact sufficient to proceed to trial on a number of his timely filed claims. A trial proceeded on the remaining allegations,[14] and the jury returned a verdict in Amtrak's favor on November 19, 1998. This appeal ensued.

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[13] Title VII actions cannot proceed in federal court unless a charge of discrimination is first filed with the EEOC. Generally, a complaint must be filed within 180 days of the alleged unlawful employment practice. If a plaintiff initially institutes proceedings with an appropriate state agency, however, the deadline is extended to 300 days. *See* 42 U.S.C. § 2000e-5(e)(1). The parties in this case agree that the applicable limitations period is 300 days.

[14] Specifically, the district court found Morgan had raised a genuine issue of material fact regarding his September 1994 suspension, the October 1994 cancellation of training, his February 1995 suspension, and his termination.

II. DISCUSSION

This court reviews a district court's grant or denial of a motion for summary judgment *de novo*. *See Robi v. Reed*, 173 F.3d 736, 739 (9th Cir. 1999). The question of whether the pre-1994 claims are time barred is a question of law reviewed *de novo*. *See Bouman v. Block*, 940 F.2d 1211, 1218-19 (9th Cir. 1991). In reviewing an order denying or granting summary judgment, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *See Robi*, 173 F.3d at 739.

Morgan argues that the conduct delineated above, including those incidents dating back to the beginning of his employment, constitutes a violation of his Title VII rights. The district court granted partial summary judgment, holding that all claims arising from occurrences prior to May 1994 were time barred.

A. *Continuing Violation Theory*

As noted *supra*, before a suit may be filed under Title VII, a plaintiff must file a complaint with the EEOC within 180 or 300 days. *See* 42 U.S.C. §2000e-5(e)(1). Title VII's limitation period limits liability to conduct occurring within the applicable limitations period; the continuing violations doctrine, however, allows courts to consider conduct that would ordinarily be time barred "as long as the untimely incidents represent an ongoing unlawful employment practice." *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir. 1999); *see e.g., Draper V. Coeur Rochester, Inc.*, 147 F.3d 1104, 1107 (9th Cir. 1998). In limiting the time frame to events taking place after May 3, the district court relied on *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996). In *Galloway*, the Seventh Circuit held the continuing violations doctrine does not apply "unless it would have been unreasonable to expect the plaintiff to sue before the statute

ran on that conduct." *Id.* at 1167. Relying on *Galloway*, the district court concluded that "[b]ecause Morgan believed that he was being discriminated against at the time that all of these acts occurred, it would not be unreasonable to expect that Morgan should have filed an EEOC charge on these acts. before the limitations period on these claims ran."

The district court's reliance on *Galloway* was mistaken. This court has never adopted a strict notice requirement as the litmus test for application of the continuing violation doctrine; in fact, in *Fiedler v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), we explicitly rejected such an approach from the Fifth Circuit. *See id.* at 987 n.10. *Fiedler* examined *Berry v. Board of Sup'rs of L.S.U.*, 715 F.2d 971 (5th Cir. 1983), a case which involved equal pay based upon gender discrimination, where the Fifth Circuit created a multi-factor test for determining whether discrete acts of harassment are closely related enough to satisfy the continuing violation theory. The *Berry* court's final factor, "perhaps of most importance," asked whether the harassing act "should trigger an employee's awareness of and duty to assert his or her rights." *Berry*, 715 F.2d at 981. We rejected the *Berry* analysis, holding that test was not "applicable in determining the continuation of a hostile environment." *Fiedler*, 218 F.3d at 987 n.10.

Indeed, this court's decision in *Fiedler*, as well as *Anderson* and *Draper*, precludes such a notice limitation on the continuing violation doctrine. In *Fiedler*, for example, plaintiff filed suit in mid-1995, after being subject to a pattern of harassing behavior stretching back to 1991. *See Fiedler*, 218 F.3d at 977, 983. Even though the harassing behavior was such that a reasonable person would have been on notice that her rights were violated,[15] we held that the continuing

[15] For example, plaintiff in *Fiedler* told her harasser in 1991 to "stop touching her and that if he continued, she would obtain legal counsel and

violation doctrine applied. *See id.* at 988. Likewise, in *Draper*, plaintiff began employment in November of 1992, and began suffering harassment shortly thereafter. *See Draper*, 147 F.3d at 1105. Even though she brought her harassment claim in mid-1995, we held:

> [b]ecause [plaintiff's] hostile work environment claim is not based upon a series of discrete and unrelated discriminatory actions, but is instead premised upon a series of closely related similar occurrences that took place within the same general time period and stemmed from the same source, her allegations set forth a claim of a continuing violation.

Id. at 1108. Finally, *Anderson* involved a similar situation. In *Anderson*, we applied the continuing violation doctrine where plaintiff filed suit in 1994 after experiencing harassment stretching back to 1986. *See Anderson*, 190 F.3d at 936-37. Based on this circuit's decisions in *Fiedler*, *Anderson*, and *Draper*, this court rejects the rigid test of both *Galloway* and *Berry*.

According to *Fielder*, a plaintiff can establish a continuing violation in one of two ways. First, by showing a series of related acts one or more of which are within the limitations period—a serial violation. A serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period. *See id. See also Green*, 883 F.2d at 1480-81. Precedent makes clear that the alleged incidents of discrimination cannot be isolated, sporadic, or discrete, *see Draper*, 147 F.3d at 1107-10. In *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990), this court found a sufficient relationship where the acts were "*plausibly related* as acts of discrimination against Sosa

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pursue a claim against him." *See Fiedler*, 218 F.3d at 977. Further, she obtained counsel in 1993 to deal with the hostile work environment.

because of his identification as a Mexican-American." (emphasis added).

The second way to establish a continuing violation is to show a systematic policy or practice of discrimination that operated, in part, within the limitations period—a systemic violation. *See id.* Systemic violations involve "demonstrating a company wide policy or practice" and most often occur in matters of placement or promotion. *Green*, 883 F.2d at 1480.

B. *Application of Continuing Violation to Morgan's Title VII Claims*

To survive summary judgment after failing to satisfy the limitations period requirement, Morgan must raise a genuine issue of disputed fact as to 1) the existence of a continuing violation—be it serial or systemic, and 2) that the violation continued into the limitations period. *See Fielder*, 218 F.3d at 983. In applying the first prong, the *Fielder* court noted, "[s]o long as the conduct has the capacity of being considered [a violation], it becomes an issue for the fact finder." *Id.* at 986. With regard to the second prong, this court looks to see whether the acts during the period "involve the same type of discrimination as those committed before the period. We must inquire whether there is a common type of discrimination, such as [racial] harassment, or if there is a common kind of employment action, such as repeated denial of a promotion." *Id.*

Morgan alleges three distinct Title VII claims, each which have different legal elements; consequently, "[w]e consider the allegations with respect to each theory separately, in determining whether any of the events underlying these claims occurred within the relevant period of limitations." *Draper*, 147 F.3d at 1108. Thus, we analyze Morgan's claims of discrimination, hostile environment, and retaliation

discretely.[16] In light of the totality of the circumstances, we are satisfied that the pre-limitations conduct at issue in this case is sufficiently related to the post-limitations conduct to invoke the continuing violation doctrine. We hold that the district court erred in granting a partial summary judgment holding that Amtrak could not be liable for conduct occurring prior to May 3, 1994.

i) Discrimination

To prove racial discrimination, Morgan must show that he 1) belonged to a class protected by Title VII, 2) was qualified for the position in question, and 3) suffered an adverse employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The alleged pre-limitations discriminatory conduct which Morgan points to includes: 1) numerous questionable disciplines and counselings (the February 1991 Rule L violation and termination which was eventually reduced to a suspension, the September 1992 counseling for absenteeism, the December 1992 counseling for his failure to pick up tie wraps, the April 1993 counseling for absenteeism, the July 1993 suspension which was later ordered expunged, the October 1993 rule violation, of which Morgan was eventually found not guilty, and the January 1994 improper withholding of pay for failure to produce a doctor's note), and 2) numerous instances in which Amtrak denied him career opportunities (his 1990 hiring as an electrician helper, the 1991 application to Amtrak's apprenticeship program, the May 1993 removal of Morgan's name from training, and the December 1993 cancellation of training). We find that these incidents, taken together with the abundant evidence from other employees and management regarding the racially discriminatory atmosphere at the Yard

[16] We note, however, that the evidence of each alleged violation significantly overlaps, and segregating them is both a difficult and artificial task.

are "sufficiently related" to the alleged incidents of discrimination that occurred within the limitations period. These incidents reveal a consistent pattern of similar employment actions (e.g., discipline and denial of professional training) over the entire five-year period of employment, perpetrated by the same core group of managers. Such incidents are not discrete or isolated. We are satisfied that the pre-limitations period is closely enough related to the acts occurring during the limitations period to trigger the operation of a continuing violation theory on Morgan's claim of racial discrimination.

ii) Hostile Environment

"A 'hostile work environment' occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment." *Draper*, 147 F.3d at 1108 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67 (1986)). As this court noted in *Fielder*, "[m]ost instances of hostile environments are not capable of facile identification. '[I]nstead, the day-to-day harassment [is] particularly significant, both as a legal and a practical matter, in its cumulative effect.'" *Fielder*, 218 F.3d at 985 (quoting *Draper*, 147 F.3d at 1108).

Evidence of the Yard's pre-limitations period hostile environment includes the decision to hire Morgan at a lower grade than others, Morgan's multiple disciplines and denial of training, the use of racially derogatory language, and the over-all racially-laden environment. We note that the jury, when commenting on the verdict, stated that it had found "evidence of a hostile work environment at the Oakland Yard during May 1994 and February, 1995" but found there was insufficient evidence to establish it was severe and pervasive. This court finds the pre-and post-limitations period incidents involve the same type of employment actions, occurred relatively frequently, and were perpetrated by the same

managers. In light of this, we find sufficient evidence to employ the continuing violation doctrine and allow the jury to consider the whole of Morgan's tenure for purposes of liability on his hostile environment claim.

iii) Retaliation

To establish a prima facie case for retaliation, plaintiff must show: 1) he has engaged in a protected activity; 2) he has suffered an adverse employment decision; and 3) there was a causal link between the protected activity and the adverse employment decision. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). Morgan presented evidence of his numerous complaints to Amtrak's EEO office, as well as the complaints he made to external authorities, regarding the racially hostile environment in the Yard. Further, the evidence reveals that while Morgan often did not receive an official response, an allegedly unrelated discipline was inevitably leveled against him within a short period. Specifically, on October 4, 1991, Morgan filed a complaint with Amtrak's EEO office and on October 16, he received a written counseling for a Rule L violation; in the fall of 1991, Morgan and others met with their congresswoman and discussed concerns about discrimination and in December 1991, a letter of counseling was placed in Morgan's file; in May 1993, he filed a race discrimination complaint with Amtrak's EEO office and within days Morgan asserts that his shift was changed.

As was noted above, the same players were involved in each of these incidents, and the incidents demonstrate a regular pattern of potentially retaliatory conduct throughout Morgan's tenure. We find that the pre-limitations conduct is sufficiently related to the conduct within the limitations period and, thus, hold the continuing violation doctrine works to allow a jury to find liability on Morgan's retaliation claim.

III. CONCLUSION

When the pre-limitations events in this case are viewed in the context of the totality of Morgan's relationship with Amtrak, it is apparent that they are part of a series or pattern of discrimination, retaliation, and hostile environment that started nearly contemporaneously with Morgan's employment and continued throughout his tenure. In light of the relatedness of the incidents, we find that Morgan has sufficiently presented a genuine issue of disputed fact as to whether a continuing violation existed. Thus, we hold that pre-limitations period conduct should have been presented to the jury not merely as background information, but also for purposes liability. Accordingly, we reverse and remand for a new trial.

In light of our ruling, we need not specifically rule on the evidentiary issues raised by Morgan; however, because these issues may arise again on retrial, we voice a general comment. We note that one of the main issues in a hostile environment or discrimination case is the pervasiveness of of the conduct at issue. In this case, the district court excluded significant pieces of information regarding such environment, specifically, portions of Morgan and Fontaine's testimony and the whole of George's testimony. This evidence went to the overall environment of the Yard. This court has previously recognized that an employer's conduct tending to demonstrate its general hostility towards a group is both relevant and admissible. *See Heyne v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995). *See also Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990) (noting that "[a]s a general rule, the testimony of other employees about their treatment by the defendant [employer] is relevant to the issue of the employer's discriminatory intent.") We further note that, in returning the verdict, the jury expressed concern about the overall environment at the Yard. The jury commented:

> We find the management at the Oakland Yard during the time of Mr. Morgan's employment to have engaged in grossly unprofessional & questionable ethical conduct. Most especially, the EEO office of Amtrak was woefully remiss in following up & supervising its recommendation for procedural changes at the Oakland facility, and their general sincerity questionable.

The testimony of Morgan and his co-workers goes to the pervasiveness of the conduct at issue. On retrial, we encourage the district court, when ruling on admissibility of evidence, to consider all evidence in light of its relevance to whether the defendant's conduct may be considered severe and pervasive.

We vacate the grant of partial summary judgment, as well the judgment on the verdict, and we grant a new trial on the overall issues of discrimination, hostile environment, and retaliation.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan 22, 2001]

No.99-15374
D.C. No. CV-96-03585-SYI

ARNER J. MORGAN, JR.,
Plaintiff-Appellant,
v.

NATIONAL RAILROAD PASSENGER CORPORATION, dba AMTRAK,
Defendant-Appellee.

ORDER

Before: LAY[1] and D.W. NELSON, Senior Circuit Judges and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Thomas voted to reject the suggestion for rehearing en banc and Judges Lay and Nelson so recommend.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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[1] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Sep 11 1998]

No. C 96-3585 SI

ABNER J. MORGAN, JR.,
Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
d.b.a. AMTRAK and Does 1-10,
Defendants.

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

On August 28, 1998, this Court heard argument on a motion for summary judgment filed by defendant National Railroad Passenger Corporation ("Amtrak"). Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS in part and DENIES in part defendant's motion for summary judgment.

INTRODUCTION

Plaintiff Abner J. Morgan, Jr. ("Morgan") filed this Title VII race discrimination suit against defendant Amtrak alleging that from 1990 to 1995 Morgan was consistently harassed and disciplined more harshly than other employees on account of his race. Morgan is African-American. Presently before the Court is Amtrak's motion for summary judgment. Amtrak argues that it is entitled to summary judgment because (1) some of the incidents of alleged discrimination are time-barred in that they occurred more

than 300 days before Morgan filed his charges of discrimination with the Equal Employment Opportunity Commission ("EEOC")[1]; (2) some of the incidents are not exhausted in that they were not specifically mentioned in Morgan's EEOC complaints; and (3) all of Morgan's discrimination and retaliation claims fail either because Morgan cannot state a *prima facie* case, or because Amtrak had legitimate, nondiscriminatory reasons for disciplining and ultimately terminating Morgan. Morgan opposes Amtrak's motion, arguing that all of his claims are properly before the Court, and that he has raised triable issues of material fact regarding these claims sufficient to defeat summary judgment.

BACKGROUND

I. Factual Background[2]

A. Untimely Claims: 1990 to May 2, 1994

Morgan began working for Amtrak in August 1990 as an electrician's helper at the Oakland Maintenance Yard ("Yard"). Morgan asserts that when he was hired he believed he was being hired as an electrician, not as an electrician's helper, and that similarly qualified and less qualified Caucasian electricians were hired as electricians at a higher rate of pay. Morgan does not submit any evidence in support of this assertion. Morgan asserts that it was only after several months of working at the Yard that he realized he was not an electrician and that despite performing the duties of an electrician, for at least a year, Morgan's position was not reclassified and his pay was not increased until April 1992 following a lengthy union grievance. Morgan also claims that

[1] Morgan's EEOC complaint was cross-filed with the Department of Fair Employment and Housing, and accordingly the relevant statutory period is 300 days.

[2] The following statement of facts is derived from both parties' papers.

he was the only person ever hired by Amtrak as an electrician's helper at the Yard.

During the period of Morgan's employment with Amtrak, Robert D. Vandenburg ("Vandenburg") was the Facility Manager at the Yard. Morgan claims that throughout his employment with Amtrak he was subjected to a pattern and practice of racially discriminatory acts, followed by retaliatory acts after he complained about discrimination. Morgan alleges that the discrimination and retaliation were perpetrated primarily by the same managers, including Vandenburg, Jerry Denton ("Denton"), Mike Bordenave ("Bordenave"), Ray Borge ("Borge"), and Earl Geske ("Geske").

On February 25, 1991, Vandenburg and Denton charged Morgan with a violation of Rule L[3] for refusing to come to a meeting without a union representative.[4] Amtrak employees have a right to union representation when they are required to

[3] Rule L of Amtrak's Rules of Conduct provides:

> Employees must obey instructions, directions, and orders from Amtrak supervisory personnel and officers except when confronted by a clear and immediate danger to themselves, property, or the public. Insubordinate conduct will not be tolerated.

Declaration of Louis G. Bellotti, Exh. D at 6.

[4] According to Amtrak, when an Amtrak employee is accused of violating a disciplinary rule, the employee is given a letter notifying him of the charges against him and of the date set for an investigatory hearing. An investigatory hearing is then conducted by an Amtrak Hearing Officer for the purpose of determining whether the employee has violated the rule as charged. The Hearing Officer takes testimony from witnesses and receives exhibits. If the Hearing Officer decides that the employee did not violate the rule, no further action is taken. If the Hearing Officer decides that the rule was violated, however, the Hearing Officer's decision is then forwarded to the head of the department in which the employee works. The department head determines what discipline should be imposed. *See* Declaration of Carlos R. Henandez, ¶ 2; Declaration of Joseph W. Deely, Exh. B; Declaration of Gerald T. Mescall, Exh. B.

attend a meeting that might lead to disciplinary action; Morgan believed that the February 25, 1991 meeting might lead to disciplinary action because he had called in sick the previous evening, and accordingly refused to attend the meeting without representation. On March 22, 1991, Amtrak terminated Morgan for the alleged Rule L violation. After Morgan filed a grievance, Amtrak reinstated him and reduced the termination to a 10 day suspension.

On August 13, 1991, Morgan filed a written request to Amtrak's personnel office in Los Angeles for admission to Amtrak's apprenticeship program. Morgan alleges that Amtrak did not formally respond to his request, but that Vandenburg informed him that *he* ran the Yard, and that Morgan stood a "snowball's chance in hell of becoming an electrician." *See* Amended Declaration of Abner J. Morgan, Jr., ¶ 10.

On October 4, 1991, Morgan filed a complaint for race discrimination with Amtrak's Equal Employment Opportunity ("EEO") office. Morgan states that he never received a formal response to his complaint. Two weeks later on October 16, 1991, Denton gave Morgan a "written counseling" for allegedly violating Rule L by helping a co-worker pack up his belongings after he was fired. Morgan states that he protested in writing that the counseling was racially motivated. On December 13, 1991, Vandenburg placed a letter of counseling in Morgan's work file, allegedly without Morgan's knowledge, accusing Morgan of being argumentative and threatening.

On September 17, 1992, Vandenburg and Borge counseled Morgan for alleged absenteeism. According to Morgan, Vandenburg acknowledged that Morgan's absenteeism was in part due to Morgan's taking time off to care for his son, who had recently attempted to commit suicide. *See* Morgan Decl., ¶ 17.

On December 1, 1992, Geske gave Morgan a written counseling for allegedly violating Rule L for failing to pick up "tie wraps"[5] during his shift. Morgan states that although picking up tie wraps was outside of his craft and not in his job description, he nevertheless picked up as many tie wraps as possible during his shift and stopped only when it became too dark to see. Morgan states that when he asked Geske why he was being charged with a Rule L violation, Geske replied that he was only doing what "they" told him to do, and that Vandenburg gave him the order.

On April 26, 1993, Denton issued Morgan a written counseling for alleged absenteeism. On May 13, 1993, Morgan requested a shift change in order to take care of his son while his family went on a trip to Boston. Alternatively, Morgan requested a one day leave of absence in addition to eight days of vacation. Morgan asserts that he was entitled to take leave based on his seniority, but that Vandenburg denied both requests.

On May 21, 1993, Morgan questioned why his name was taken off a list of employees scheduled for training on heating, air and ventilation systems. According to Morgan, Vandenburg told him that he did not have the mental capacity for such training. Morgan has submitted deposition testimony of Elwood Conley, a former Amtrak foreman who was terminated in 1992, who testified that Vandenburg commented to him that African-Americans were less intelligent than Caucasians, and that Vandenburg "didn't want too many blacks because of . . . problems." *See* Declaration of Pamela Price, Exh. H at 14-23

On May 25, 1993, Morgan filed another written complaint with Amtrak's EEO office regarding alleged ongoing racial discrimination he was experiencing at the Yard. According to

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[5] According to Morgan, tie wraps are small pieces of wire like the ties used on plastic bread loaf wrappers.

Morgan, three days later his job was "abolished" and he was reassigned to the graveyard shift. Morgan does not explain exactly how his job was "abolished." On May 30, Morgan filed another written complaint with Amtrak's EEO office.

On July 14, 1993, Morgan was charged with a violation of Rule O[6] and suspended for 15 days for taking an extra vacation day with his family in May. Following a lengthy union grievance, Amtrak settled the dispute in November 1994, and Morgan received back pay. The suspension was ordered expunged from his file, although Morgan alleges that Vandenburg did not comply with the expungement order.

On October 13, 1993, Morgan was charged with Rule F-1[7] and F-3[8] violations for allegedly making improper remarks to a union representative, Henry Bios, in July 1993. An investigatory hearing was held in December 1993 at which Morgan was found not guilty of the charges, and according to Morgan all mention of the matter was ordered expunged from his file. Morgan-alleges that Vandenburg did not comply with the expungement order.

The conversation between Morgan and Rios was overheard by another Amtrak employee, Kenneth Phillips. Although the record is somewhat unclear on this matter, it appears that Phillips initially substantiated Rios' version of events, and then sometime later changed his account so that it corroborated Morgan's. Morgan alleges that after Phillips changed his account, Vandenburg and other managers

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[6] The parties have not provided the Court with the text of Rule O.

[7] Rule F-1 states: "All employees are required to conduct themselves in a courteous and professional manner in dealing with the public and other Amtrak employees. Boisterous conduct or horseplay and profane or vulgar language are prohibited."

[8] Rule F-3 states "Conduct involving dishonesty, immorality or indecency is prohibited. Employees must conduct themselves on and off the job so as not to subject Amtrak to criticism or loss of goodwill."

pressured Phillips to lie and say that Morgan acted improperly. In support, Morgan has submitted the deposition testimony of Ken Phillips, in which he states he was called to Vandenburg's office, and that Vandenburg, Denton, Geske, and Louis Bellotti spoke to Phillips about the incident. Phillips was asked if Morgan had threatened him, and if that was the reason why Phillips had changed his account and was now lying about the incident. Phillips testified that he reassured them that he was not lying and that he in fact did not know Morgan. Phillips then testified that Vandenburg asked the other managers to leave, and that once Phillips and Vandenburg were alone, Vandenburg stated that "Abner is going to be fired anyways[sic]," and "I need you to change your story so we can fire Abner." According to Phillips, Vandenburg offered to "protect" Phillips if he changed his story, and that if Phillips changed his story "great things" could happen for Phillips at Amtrak. *See* Price Decl., Exh. M at 58:8-60:19.

Morgan alleges that on October 14, 1993 Vandenburg assaulted him by placing both of his hands on Morgan's shoulders and forcing his upper torso to his knees. Morgan reported the incident to the police and filed a formal complaint with Amtrak's EEO office. Morgan contends that Amtrak did not investigate his complaint.

In December 1993, Bellotti canceled a training scheduled for Morgan. Morgan complained about the cancellation on January 18, 1994, and alleges that he received no response from Amtrak.

On January 14, 1994, Bellotti and Denton required Morgan to bring a doctor's note for one day's absence due to illness before Morgan could return to work. Morgan contends that this requirement was not included in Amtrak's sick leave policy, and that as a result of Bellotti's and Denton's refusal to allow him to return to work, Morgan lost three day's pay. Morgan appealed the loss of his pay for the three days, and on

June 14, 1994 Amtrak settled the matter by agreeing to pay Morgan for the time he was not permitted to work *See* Price Decl., Exh. D.

B. Timely Claims: May 3, 1994 to February 1995

(1) 15 Day Suspension in September 1994

On September 9, 1994, Morgan was charged with a violation of Rule L for allegedly failing to complete his work assignments on September 2. On September 2, Morgan worked a midnight to 8:00 am shift under the supervision of Luerean Butler Van de Streek. According to Amtrak, Van de Streek assigned Morgan to work all of the cars on train number 702 and the last two cars on train number 704 (cars 53503 and 54013). Morgan completed his work on train number 702, and that train left on time at 6:30 am. At 6:45, in the presence of Earl Geske, Van de Streek reminded Morgan that he needed to work the last two cars on train number 704. Geske was Van de Streek's direct supervisor. Morgan did not complete the work on these cars, and Van de Streek gave Morgan an "oral counseling" on the matter. After the oral counseling, Borge charged Morgan with a violation of Rule L for failing to complete his work.

On October 3, 1994, Amtrak held an investigatory hearing on the Rule L charge. The Hearing Officer, Carlos Hernandez, concluded that Morgan was guilty of the charge. Hernandez forwarded his decision to Gerald Thomas Mescall, who was at that time the Mechanical Superintendent for Amtrak's Western Division. Mescall decided to suspend Morgan for 15 days.

Morgan contends that while he was assigned to work on car 53503 on train 704, the other car —number 54013—was assigned to a Caucasian electrician, George Guse. Morgan further contends that although Guse did not complete his work on that car, Guse was never charged with a Rule L violation, or disciplined in any way. *See* Morgan Decl., ¶ 34;

Declaration of Robert Ramirez, ¶ 10. Additionally, Morgan contends that it was Amtrak's policy not to levy charges of rules violations if an oral or written counseling was given to the employee on the matter, and thus after Van de Streek gave Morgan an oral counseling about the allegedly unfinished work the Rule L charge should have never been filed against him.

(2) February 1995 Termination

In December 1994, electrician Robert Craven and foreman Michael Bordenave accused Morgan of threatening Bordenave during a safety meeting. The allegations were not substantiated, and no disciplinary action was taken against Morgan.

On February 4, 1995, Bordenave again accused Morgan of threatening him. The parties present markedly different versions of events. According to Amtrak, on that day Morgan was working the midnight to 8:00 am shift, and his immediate supervisor was Bordenave. At the beginning of the shift, Bordenave gave Morgan his assignments for the evening. Later in the shift, Bordenave asked Morgan about his progress. Morgan ignored the question, announced that he had to "go shit," and walked away. As he walked away, Morgan mumbled profanity. Bordenave confronted Morgan about his inappropriate reaction to Bordenave's question, at which point Morgan stated, "If you keep fucking with me, punk motherfucker, you are going to find out." Bordenave left the area and reported the incident to the General Foreman, Denton. Shortly thereafter, Morgan confronted Bordenave in the lunchroom, stating, "You fucked up. I will be waiting for you outside the gate and you will see how Amtrak protects you now."

Bordenave reported this second incident to Denton. Denton instructed Bordenave and Morgan to report to his office so they could discuss the matter. Morgan refused, stating he would only enter Denton's office if he was accompanied by a

union representative. Denton told Morgan that his representative was not needed because Denton only wanted to discuss the matter. Morgan continued to refuse to enter the office, and walked away. As a result, Denton informed Morgan that he was being removed from service for disobeying a direct order and for threatening a supervisor. Morgan was then instructed to leave the property.

Morgan's version of events is as follows: On February 4, 1995, Bordenave told Morgan that he would falsely claim that Morgan threatened him and that Amtrak's management would believe Bordenave, not Morgan. Morgan states be never threatened Bordenave, and has submitted the declaration of Meriola Gotthardt, a fomer Amtrak employee, which states that Gotthardt heard Bordenave say be would falsely accuse Morgan. *See* Declaration of Meriola Gothardt, ¶ 6. Morgan states that when Denton ordered him to go into his office, he asked for a union representative because he believed that the meeting could lead to disciplinary action. When his request for a union representative was denied, Morgan asked if co-worker Michael Shaw could be a witness to the meeting. Denton responded by ordering everyone to leave the main office, and screamed at Morgan to "get his black ass" into Denton's office. Morgan refused to enter Denton's office without union representation or a witness, and was offended by Denton's remark.

Morgan was formally charged with violating Rule F-2 and Rule L, and an investigatory hearing was held. Hearing Officer John Eschenbach determined that the charges against Morgan were proven, and referred his decision to Joseph W. Deely, the Director of Amtrak's California Corridor. Deely made the decision to terminate Morgan's employment

(3) Denial of Jury Duty Pay

Morgan claims that be was denied pay for jury duty in June 1994, and again in January/February of 1995 in violation of the collective bargaining agreement between Amtrak and the

union. There are few facts in the record regarding the June 1994 jury duty, as Morgan simply alleges that he was not paid for serving and Amtrak does not respond to this allegation. With regard to the 1995 jury duty, Morgan served on January 30, 1995 and February 1, 1995. It is undisputed that Morgan was not entitled to jury duty pay for February 1, because that day was Morgan's regular rest day. However, the parties dispute whether Morgan was in fact ever paid for serving on January 30, 1995.

(4) Cancellation of Training

Morgan alleges that in October 1994 Borge directed Gary Biembom to cancel a scheduled training for Morgan because Morgan had a "bad attitude." The factual record is unclear as to whether the training was in fact canceled.

(5) Denial of Access to Work File

Morgan claims that he made numerous requests to view his work file as early as November 1991, and that Vandenburg continued to deny Morgan's requests up to and including December 1994. Amtrak explains that Amtrak maintains an official "personnel" file and an unofficial "work" file on each employee: in December 1994 the personnel files were maintained by Amtrak's personnel department in Los Angeles, while the work files were kept at the Oakland Yard. Amtrak states that Vandenburg interpreted Amtrak's policy as requiring employee access to their personnel files, but not to their work files, and that based on this understanding, Vandenburg denied Morgan's December 1994 request to view his "work" file. Vandenburg has submitted a declaration stating based on his interpretation of Amtrak policies, it was his general practice not to allow employees to view their work files. *See* Declaration of Robert D. Vandenburg, ¶ 4.

(6) Denial of Union Representation in December 1994

Although Morgan has identified in discovery responses that he believes Amtrak discriminated against him by denying him union representation at a meeting in December 1994, Morgan does not address this allegation in his opposition to Amtrak's motion, nor has Morgan provided any evidence in support of this allegation.

(7) Posting Notice Regarding Grievance/Denial of Bid for Job 515

Morgan alleges that in January 1995, Vandenburg posted a notice at the Oakland Yard "to all concerned" regarding a pending grievance that Morgan had filed regarding his electrician seniority date. Amtrak has submitted evidence that Vandenburg posted the notice because he was directed to do so by the National Railroad Adjustment Board, and Morgan does not dispute this fact. *See* Plaintiff's Amended Separate Statement of Facts # 18.

Morgan also alleges that the denial of his bid for a supervisory position (Job Number 515) was discriminatory because, had his electrician seniority date been set at his initial hiring date in 1990, he would have had the most seniority of all the applicants for the position. However, because Morgan did not become an electrician until 1992, Morgan was not selected, and instead Luerean Butler Van de Streek, an African-American woman, was hired.

2. Procedural Background

On February 27, 1995—after Morgan's suspension but prior to his termination—Morgan filed a charge of discrimination against Amtrak with the EEOC. In his charge, Morgan stated that beginning in 1991 he protested Amtrak's discriminatory treatment of himself and other African-American employees, and that since that time he had been subjected to retaliation. Morgan then identified four

discriminatory and/or retaliatory acts: (1) denial of refrigeration and air conditioning training in October 1994; (2) denial of access to his work record in December 1994; (3) suspension without pay pending the investigation of the charge of threatening his supervisor; and (4) denial of pay for jury duty in February 1995. *See* Complaint, Exh. 1. After Morgan was terminated from Amtrak, he amended his EEOC charge on March 8, 1995 to allege that his termination was discriminatory and retaliatory. On July 3, 1996, the EEOC issued a "Notice of Right to Sue." Morgan filed the instant lawsuit on October 2, 1996.

LEGAL STANDARD FOR SUMMARY JUDGMENT

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In a motion for summary judgment, "[if] the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact, "the burden of production then shifts so that "the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 106 S. Ct. 317 (1986)).

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. *See T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus Co. Ltd. v.*

Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991). The evidence presented by the parties must be admissible. Fed, R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Falls Riverway Realty Inc. v. City of Niagara Falls*, 754 F.2d 49 (2d Cir. 1985); *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. *See e.g., Fong v. American Airlines, Inc.* 626 F.2d 759, 762-63 (9th Cir. 1980).

DISCUSSION

1. Morgan's Claims Prior to the Limitations Period are Time-Barred

In its motion for summary judgment, Amtrak first argues that it is entitled to judgment as a matter of law on all acts of alleged discrimination which occurred more than 300 days before Morgan filed his complaint with the EEOC. Morgan argues that his allegations of conduct occurring prior to the 300 day period are actionable under the "continuing violations" doctrine.

Under the continuing violations doctrine, "allegations of conduct occurring prior to the limitations period are actionable if the complainant can show that they are part of a series of related acts against the complainant," *Hashimoto v. Dalton*, 118 F.3d 671, 678 (9th Cir. 1997), *cert denied*,— U.S.—, 118 S. Ct. 1803 (1998), and at least one of the allegedly discriminatory acts falls within the limitations period. See *Draper v. Couer Rochester, Inc.*, 1998 WL 340411, at *4 (9th Cir. June 29, 1998) (to be reported at 147 F.3d 1104). However, even if both of these conditions are met, courts have found that allegations of discrimination prior to the limitations period are barred if the allegedly discriminatory act would or should have triggered the plaintiff's awareness of a violation and accompanying duty to

assert his rights *See e.g., Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1167 (7th Cir. 1996); *Roberts v. Gadsden Memorial Hosp.* 835 F.2d 793, as modified at 850 F.2d 1549 (11th Cir. 1988); *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). As the Seventh Circuit has noted,

> The most difficult case arises when a long-continued series of harassing acts definitely are a series, a pattern, and not merely a set of discrete events, yet it was evident long before the plaintiff finally sued that she was the victim of actionable harassment. It seems to us that in such a case, while she can still sue provided that the last act of harassment occurred within the statute of limitations, she cannot reach back and base her suit also on conduct that occurred outside the statute of limitations; for she had no excuse for waiting that long.

Galloway, 78 F.3d at 1167. The *Galloway* court then held that "the plaintiff may not base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations." *Id.*

The factual record clearly establishes that Morgan believed as early as 1991 that Amtrak and its managers were discriminating against him on the basis of his race and retaliating against him for his complaints. For example, on October 4, 1991, Morgan filed a written complaint with Amtrak's EEO office complaining of "blatant racism" at the Oakland Maintenance Yard, and specifically alleging the following acts as discriminatory: (1) the March 22, 1991 termination for a Rule L violation; (2) Amtrak's hiring of Morgan as an electrician's helper rather than as an electrician; and (3) Amtrak's failure to respond to Morgan's request to enter Amtrak's apprenticeship program. *See* Morgan Decl.,

Exh. D. Morgan further states in his declaration that when Denton charged him with a Rule L violation on October 16, 1991, he "protested strenuously" that this action was racially motivated, and complained in writing. *Id.* at ¶ 12. In late 1991, Morgan and other Amtrak employees met with then-Congresswoman Barbara Boxer to complain about discriminatory conditions at Amtrak. *Id.* at ¶ 13. Morgan states that as a result of this meeting, Rep. Boxer contacted Amtrak's General Inspector, Fred Weiderhold, who visited the Yard three times in 1992. Morgan personally met with Weiderhold, and Morgan "tried repeatedly to bring the continuing discriminatory and retaliatory practices at Amtrak to his attention." *Id.* at ¶ 16. Throughout 1992, 1993 and 1994 Morgan continued to complain to Amtrak of race discrimination. *See* Morgan Decl., Exh G. (Oct. 21, 1993 EEO complaint); Exh. F (Sept. 17, 1992 letter to Weiderhold) Exh. H. (Jan. 18, 1994 EEO complaint).

Statutes of limitations "serve the important purpose of encouraging the prompt filing of claims and by doing so enhancing the likelihood of accurate determinations and removing debilitating uncertainty about legal liabilities." *Galloway*, 78 F.3d at 1165. In the instant case, Morgan did not file his complaints with the EEOC until February 1995, despite the fact that he believed as early as 1991 that Amtrak was discriminating and retaliating against him. Because Morgan believed that he was being discriminated against at the time that all of these acts occurred, it would not be unreasonable to expect that Morgan should have filed an EEOC charge on these acts before the limitations period on these claims ran. Accordingly, the Court holds that all allegations of discrimination occurring prior to the limitations period are time-barred.[9]

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[9] This holding does not preclude Morgan from presenting evidence of acts that occurred prior to the limitations period if they are relevant to his timely claims of discrimination and retaliation; this holding simply precludes Morgan from recovering damages on these claims.

2. Some Claims Not Specifically Mentioned in the EEOC Charges That Occurred Within the Limitations Period are Actionable

Amtrak next argues that Morgan is limited to litigating only those timely claims that were specifically mentioned in his February and March of 1995 EEOC complaints. In those charges, Morgan listed four matters: (1) the alleged denial of "updated refrigeration and air conditioning training" in October 1994; (2) the alleged denial of access to his work record in December 1994; (3) the alleged docking of his pay for days served on jury duty in February 1995; and (4) the suspension and subsequent termination for threatening and using profanity against his supervisor and general foreman. In addition to these acts of alleged discrimination, Morgan contends in this lawsuit that Amtrak discriminated against him by denying him pay for jury duty in June 1994, suspending him without pay for 15 days in September 1994 for allegedly failing to complete his work assignments, denying him union representation at a meeting in December 1994, posting a notice about a pending grievance in early 1995, and denying Morgan's bid for a job in January 1995.

"The remedial purpose of Title VII and the paucity of legal training among those whom it is designed to protect require charges filed before the EEOC to be construed liberally." *Stache v. International Union of Bricklayers and Allied Craftsmen*, 852 F.2d 1231, 1233 (9th Cir. 1988), *cert. denied*, 493 U.S. 815, 110 S. Ct. 64 (1989). If a plaintiff files a lawsuit based on incidents not specifically listed in his EEOC charge, a federal court may hear the additional claims if they are "like or reasonably related to the allegations contained in the the EEOC charge." *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990); *accord EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994).

"In determining whether an allegation under Title VII is like or reasonably related to allegations contained in a previous EEOC charge, the court inquires whether the original EEOC investigation would have encompassed the additional charges." *Green v. Los Angeles Cty. Superintendent of Schools*, 883 F.2d 1472, 1476 (9th Cir. 1989). The Court concludes that the additional allegations regarding unpaid jury duty, the 15 day suspension in September 1994, and the denial of union representation at a December 1994 meeting are "like or reasonably related" to the claims Morgan specifically mentioned in his EEOC charges. With regard to unpaid jury duty, Morgan alleges that Amtrak denied him pay for jury duty in violation of Amtrak policy both in June 1994 and in January-February 1995. These claims are virtually identical. As for the September 1994 suspension, Morgan claims that the initiation of the charges against him was discriminatory and retaliatory, the same allegation he levies against the February 1995 charges. In the Court's view, these charges are similar, and accordingly Morgan may pursue these claims in this litigation. Finally, Morgan claim that he was denied union representation at a meeting in December 1994 is "like or reasonably related" to his allegation that he was denied union representation in connection with the February 1995 termination.

However, the Court concludes that Morgan's allegations regarding the posting of a grievance in early 1995 and the fact that Morgan was not selected for job number 515 are not "like or reasonably related" to the allegations contained in his EEOC charges, and accordingly these allegations are not actionable. "Where claims are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider disputes before federal suits are initiated." *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 730 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108, 105 S. Ct. 784 (1985). In the view of the Court, Morgan's allegations regarding the posting

of a notice and job number 515 are not so closely related that the EEOC would have investigated these claims in the course of investigating the claims in Morgan's EEOC charges.

In any event, even if Morgan had included these allegations in his EEOC charges, the Court concludes that Morgan has not sustained his burden to defeat summary judgment. As noted earlier, Morgan does not dispute that Vandenburg posted the notice of the pending grievance because he had been directed to do so by the National Railroad Adjustment Board. Accordingly, there is no evidence that the posting of the notice was discriminatory. Moreover, Morgan does not allege that any adverse employment consequences flowed from the posting of the grievance.

With regard to job number 515, Morgan alleges that he should have been awarded the position because, had his seniority date been set when he was first hired as an electrician's helper, rather than when he became an electrician, he would have had the most seniority of all applicants for job number 515. However, because Amtrak did not reclassify Morgan's position until 1992, "the subsequent selection of any of the later-hired electricians for promotions instead of Mr. Morgan is suspect and inherently based on unfair advantage." Plaintiff's Opposition, 23:11-13. Even if this allegation had been contained in Morgan's EEOC charges, it would not withstand summary judgment because Morgan has failed to establish a *prima facie* case of race discrimination. Morgan has not produced any evidence in support of his allegation that "Amtrak hired other less qualified Caucasian Electricians between the beginning of 1991 and April 1992 and paid them at an Electrician's rate." Morgan Decl. ¶ 5. Furthermore, it is undisputed that employee selected for job number 515 was Luerean Butler Van de Streek, an African-American woman. As such, Morgan has failed to offer evidence that "give[s] rise to an inference of unlawful discrimination," a necessary element of

a prima facie case. *Texas Dep't of Community Affairs v. Burdine*, 450 US. 248, 253, 101 S. Ct. 1089, 1094 (1981).

3. Morgan has Raised Genuine Issues of Material Fact with Regard to Some of His Actionable Claims

Amtrak finally argues that it is entitled to summary judgment on Morgan's timely claims because it has provided legitimate, nondiscriminatory reasons for Morgan's September 1994 suspension and February 1995 termination, and because Morgan cannot establish a *prima facie* case of discrimination with regard to his jury duty, work file, denial of training, and denial of union representation claims.

A. September 1994 Suspension

Amtrak asserts that there was a legitimate and nondiscriminatory reason for Morgan's 15 day suspension in September 1994, and that Morgan has failed to produce any evidence of pretext. Amtrak argues that Mescall's decision to suspend Morgan was based upon the Hearing Officer's decision that Morgan had violated Rule L for failing to complete his work assignments. Amtrak argues that Morgan has not shown that the suspension decision was motivated by his race or an intent to retaliate against him, and that its "honest belief" that Morgan violated Rule L entitles it to summary judgment on this claim.

The Ninth Circuit has recently held that in a discrimination lawsuit, once a defendant has articulated nondiscriminatory reasons for the allegedly discriminatory conduct, a plaintiff may rebut this presumption and raise a triable issue of fact to defeat summary judgment in two ways. First, "[w]hen the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." *Godwin v. Hunt Wesson Inc.*, 1998 WL 547238, at *4 (9th Cir. Aug. 11 1998) (to be published at___F.3d___). Alternatively, "[i]n

those cases where direct evidence is unavailable, however, the plaintiff may come forward with circumstantial evidence that tends to show that the employer's proffered movtives were not the actual motives because they are inconsisent or otherwise not believable. Such evidence of 'pretense' must be 'specific' and substantial in order to create a triable issue [of fact] . . ." *Id.* at *5.

In the instant case, Morgan submits the following evidence that Amtrak selectively enforced its rules against Morgan. Robert Ramirez, who from 1990 to 1995 was in charge of filing and processing grievances and representing Amtrak electricians from the Yard at investigatory hearings, has submitted a declaration stating that during that time period no other electricians at the Yard were charged with a Rule L violation. *See* Declaration of Robert Ramirez, ¶ 2. Ramirez represented Morgan in the hearing on the alleged September 1994 Rule L violation, as well as the February 1995 charges. Ramirez states that during the October 3, 1994 hearing, "testimony and evidence showed that Car 54013 [one of the cars Morgan was charged with not completing work on] was not assigned to Mr. Morgan, but was assigned to George Guse, a white Electrician. George Guse was never disciplined for not working on Car 54013." *Id.* at ¶ 10.[10] Morgan has also submitted the deposition testimony of Earl Geske, in which he states that once an employee has been given a written or oral counseling about a matter, the employee is not also charged with a rule violation. *See* Price Decl., Exh. J at

[10] Morgan has submitted other evidence of selective enforcement of rules by Amtrak. Morgan has submitted evidence that a Caucasian electrician was not charged with a Rule L violation for refusing to attend a meeting without his union representative, while Morgan was charged with a Rule L violation for the same offense, *see* Price, Decl., ¶ 12 and Exh. K, and that a Caucasian electrician was not brought up on charges for cursing at his supervisors, while Morgan was charged with a rule violation for such conduct. *See id.* at ¶ 10 and Exh. I.

100:10-26. However, Morgan has submitted evidence that Butler Van de Streek gave him an oral counseling on the matter, but that Morgan was nevertheless brought up on Rule L charges.

Morgan has also submitted the deposition testimony of Elwood Conley, a former Amtrak employee, who testified that Borge, the charging officer, had a habit of referring to African-Americans as "shuffle-butt niggers." *See* Price Decl., Exh. H at 21:14-17. Finally, Morgan has submitted evidence suggesting that since at least July 1993 both Borge and Geske (who testified at the hearing) were intent on getting Morgan fired. Kenneth Phillips, a former Amtrak employee, testified at his deposition that Geske was among a group of managers who attempted to pressure Phillips to lie so that Amtrak could fire Morgan. *See* Price Decl., Exh. M at 58:18-60:9. Gary Biemborn, an Amtrak trainer, testified in his deposition that in October 1994 Borge instructed Biemborn not to provide training to Morgan. *See* Price Decl., Exit F. at 86:16-23.

The above evidence persuades the Court that Morgan has raised a genuine issue of fact as to whether Amtrak's nondiscriminatory explanation for its actions is the true reason or whether it masks discriminatory motives. Amtrak argues that regardless of whether Borge, Geske and other Amtrak employees acted with discriminatory intent, the fact that the hearing officer, Hernandez, and the official who ultimately decided to suspend Morgan, Mescall, acted on a good faith belief that Morgan had violated Rule L, Amtrak is not liable for discrimination or retaliation. In advancing this argument, Amtrak relies primarily on *Elrod v. Sears Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991). In *Elrod*, the Eleventh Circuit found that a plaintiff alleging age discrimination had failed to offer any substantially probative evidence at trial that age more likely than not motivated his discharge. At trial, the defendant, Sears, Roebuck and Company, justified terminating Elrod on the ground that it believed he had

engaged in sexual harassment of numerous female employees. Sears believed so after it conducted a lengthy investigation of charges, and the plaintiff repeatedly acknowledged in writing that he had acted inappropriately. However, at trial Elrod contended that he was innocent of the sexual harassment charges. The Eleventh Circuit held that it was irrelevant whether Elrod was in fact guilty of the sexual harassment charges; rather, what was salient was whether Sears believed that Elrod was guilty of harassment, and if so, if that belief was the reason behind his discharge. Moreover, the court noted that Elrod had not offered any substantially probative evidence that age more likely than not motivated his discharge.

The Court initially notes that *Elrod* is not binding authority in the Ninth Circuit, and that therefore the Court is not required to apply *Elrod* as Amtrak argues. It is unclear whether the Ninth Circuit would adopt the *Elrod* court's analysis. *See Mitchell v. Keith*, 752 F.2d 385, 388-89 (9th Cir.), *cert. denied, General Motors Corp. v. Mitchell*, 472 U.S. 1028, 105 S. Ct. 3502 (1985) ("It is the law of this circuit that an employer who acted in good faith in firing an employee may be liable where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions . . . .") (internal quotation omitted).

However, even if the Court were to apply *Elrod*, the Court would nevertheless deny Amtrak's motion for summary judgment on this claim because of significant factual differences between *Elrod* and this case. First, the plaintiff in *Elrod* complained only that the discharge was discriminatory; in the instant case, Morgan alleges that not only was the ultimate suspension discriminatory, but that the initiation of the charges was itself discriminatory. Second, the *Elrod* court held that Sears was entitled to judgment because it had a *good faith* belief that Elrod had engaged in misconduct. In light of the evidence presented suggesting that Amtrak's initiation

and prosecution of rule violations was discriminatory and retaliatory, there is a question of triable fact as to whether Amtrak had a good faith belief that the charges were founded. Similarly, Morgan has submitted evidence that the hearing itself was not fair. *See* Ramirez Decl. ¶¶ 3, 10. Third, the *Elrod* court made it clear that Sears was entitled to a directed verdict not only because Sears had acted on its good faith belief, but *also* because Elrod had not put forth substantially probative evidence that age was the motivating factor for his discharge. *See Elrod*, 939 F.2d at 1471. In the instant case Morgan has submitted a significant amount of evidence suggesting that Amtrak managers and supervisors may have acted with discriminatory intent in initiating and prosecuting charges of rule violations against Morgan. For these reasons, the Court hereby DENIES defendant's motion for summary judgment on this claim.

B. February 1995 Termination.

As with the September 1994 suspension, Amtrak argues that it has legitimate, nondiscriminatory reasons for terminating Morgan because Amtrak believed, based upon the Hearing Officer's decision, that Morgan was guilty of the charged violations. For the reasons set forth above, the Court rejects this argument. The Court finds that Morgan has raised a genuine issue of fact as to whether Amtrak's proffered reason for terminating him was simply pretext for race discrimination and retaliation. Much of the same evidence that Morgan submitted in relation to the September 1994 suspension is relevant to the February 1995 termination because it raises a genuine issue of fact as to whether the initiation of disciplinary charges against Morgan was discriminatory. Morgan has also submitted evidence that the investigatory hearing was unfair; Ramirez states in his declaration that Borge "directed and controlled" the hearing and that the Hearing Officer reversed his position after Borge expressed his opinion regarding the issue. *See* Ramirez Decl.,

¶ 3. Morgan has submitted the declaration of Meriola Gotthardt, a former Amtrak engineer, who states that in 1992 she overheard Chuck Berg, a road foreman, tell J.W. Deely (the Amtrak official who decided to terminate Morgan) that he was going to give some work to one of those "nigger bitches," and that Deely did not reprimand Berg. *See* Gottbardt Decl. ¶ 1[11] Gotthardt also states that in 1993 she heard Deely state that "the problem with these niggers is that after you train them, they walk out on you." *Id.* at ¶ 2. Gotthardt states she complained to Deely regarding the use of racial slurs at the Yard, and that nothing was done in response to her complaint. *Id.* at ¶ 5. Finally, Gotthardt states that in approximately late 1994 or early 1995, she saw Bordenave and Morgan having a "heated discussion," and that she heard Bordenave say he was going to accuse Morgan of threatening him and that "they" would believe him. *Id.* at ¶ 6.

For the reasons described above, the Court hereby DENIES defendant's motion for summary judgment on this claim.

C. Jury Duty

Morgan alleges that Amtrak did not pay him for jury duty served in June 1994 and January and February 1995. Amtrak argues Morgan has not established a *prima facie* case with regard to these allegations because the denial of jury pay is not an "adverse employment action" under Title VII and because Morgan has not submitted any evidence giving rise to an inference of discrimination. Morgan responds that the

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[11] Amtrak objects to Gotthardt's declaration on the ground that Morgan did not identify Gotthardt in his response to an interrogatory asking for all facts regarding Morgan's contention that Deely harbored racial animus. Amtrak requests that the Court strike Gotthardt's declaration, citing *School Dist. No. 1J. Multnomah Cty. v. Acands Inc., et al.* 5 F.3d 1255 (9th Cir. 1993). The Court declines to strike Gotthardt's declaration, concluding that it contains relevant evidence and that Morgan's failure to identify Gotthardt in his interrogatories was not in bad faith.

denial of jury duty pay is an adverse employment action, but does not address Amtrak's contention that there is no evidence in the record suggesting that the denial of jury pay was discriminatory or retaliatory.

Upon the Court's review of the record, the Court finds that Morgan has not put forth any evidence suggesting that the alleged denials of jury duty pay in 1994 and 1995 were discriminatory or retaliatory. Accordingly the Court finds that Morgan has not stated a *prima facie* case, and hereby GRANTS Amtrak's motion for summary judgment on these claims.

D. Canceled Training

Morgan alleges that Amtrak canceled training that was scheduled for him in October 1994. Amtrak advances two arguments in its motion for summary judgment on this claim: (1) no one was provided training in October 1994, and therefore Morgan was not treated differently on the basis of his race; and (2) Morgan was certified to work on all Amtrak equipment, and therefore any denial of training did not constitute an "adverse employment action."

The Court rejects Amtrak's arguments and finds that there are disputed issues of material fact regarding Morgan's claim of canceled training. Morgan has submitted evidence that Borge told Biemborn not to train Morgan in October 1994 because Morgan had a "bad attitude." Morgan has also submitted evidence that Borge was known to make racially discriminatory remarks, and that Borge was part of a group of managers who desired to have Morgan terminated. Amtrak's assertion that no other Amtrak employee was provided training in October 1994 has no bearing on whether Amtrak discriminated and/or retaliated against Morgan by canceling his training.

The Court also rejects Amtrak's argument that Morgan's claim fails because the denial of training did not constitute an

"adverse employment action," concluding that there are genuine issues of disputed fact whether the denial of training adversely affected Morgan's employment. For these reasons, the Court DENIES defendant's motion for summary judgment on this claim.

E. Denial of Access to Work File

Morgan claims that in December 1994, Vandenburg denied his requests to view his work file, and that these denials were discriminatory and retaliatory. Amtrak argues that the denial of access to a work file is not an adverse employment action, and therefore that Morgan has not established a *prima facie* case regarding this claim. The Court agrees, finding that Morgan has not alleged any particular adverse consequences that flowed from the denial of access to his files. Based upon the facts of this case, it appears that this allegation is better viewed not as a separate claim, but merely as evidence that Morgan may submit of Amtrak's alleged discrimination and retaliation against him. Accordingly, the Court GRANTS Amtrak's motion for summary judgment on this claim.

F. Denial of Union Representation

As noted earlier, although Morgan has stated in discovery responses that he believes Amtrak discriminated and/or retaliated against him by denying him union representation at a meeting in December 1994, Morgan does not discuss this allegation in his opposition papers, nor does he present any evidence in support of this allegation. Accordingly, the Court GRANTS Amtrak's motion for summary judgment on this claim, as Morgan has failed to establish a *prima facie* case regarding this allegation.

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS defendant's motion for summary judgment on Morgan's claims regarding: (1) alleged discrimination or retaliation

which occurred prior to the 300-day limitations period, or May 3, 1994; (2) posting the notice of the grievance in early 1995; (3) denial of Morgan's bid for job number 515 in 1995; (4) denial of jury duty pay in 1994 and 1995; (5) denial of access to work files in December 1994; and (6) denial of union representation in December 1994.

Finding there are triable issues of fact, the Court hereby DENIES defendant's motion for summary judgment on Morgan's claims regarding: (1) the September 1994 suspension; (2) the February 1995 suspension and termination; and (3) cancellation of training in October 1994.

IT IS SO ORDERED

Dated: September 10, 1998

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge